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APPENDIX.

In the Supreme Court of the United States

OCTOBER TERM, ~~1968.~~ 1969

No. ~~1185.~~ 66

ANGHEL GOLDSTEIN, aka Andrei Pietraru,
IULIU NASTA, aka Julius Nasta and
GHEORGHE FUNDI,
on behalf of themselves and all others similarly situated,
Appellants,

vs.

JOSEPH A. COX and SAMUEL DiFALCO,
Surrogates of the County of New York,
EDWARD F. SILVER,
Surrogate of the County of Kings,
CHRISTOPHER C. McGRATH,
Surrogate of the County of Bronx,
JOHN T. CLANCY,
Surrogate of the County of Queens,
ARTHUR LEVITT,
State Comptroller,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

Jurisdictional Statement Filed March 11, 1969.
Probable Jurisdiction Noted April 28, 1969.

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No. 66 Civil 4487.

In the United States District Court

SOUTHERN DISTRICT OF NEW YORK.

ANGHEL GOLDSTEIN,
Also Known as Andrei Pietraru,
IULIU NASTA,
Also Known as Julius Nasta and
GHEORGE FUNDI,
On behalf of themselves and all others
similarly situated,
Plaintiffs,

vs.

JOSEPH A. COX and S. SAMUEL DiFALCO,
Surrogates of the County of New York,
EDWARD S. SILVER,
Surrogate of the County of Kings,
CHRISTOPHER C. McGRATH,
Surrogate of the County of Bronx,
JOHN T. CLANCY,
Surrogate of the County of Queens,
ARTHUR LEVITT,
Comptroller of the State of New York,
Defendants.

RELEVANT DOCKET ENTRIES.

Dec. 28-66. Filed complaint and issued summons.

Jan. 13-67. Filed pltffs' affdvt. & notice of motion to convene a 3-judge court, etc.—ret. 1-17-67.

Feb. 24-67. Filed affdvt. of Daniel M. Cohen in opposition to motion to convene 3 judge court.

Mar. 1-67. Filed reply affdvt. of John R. Vintilla (filed in court).

Apr. 5-67. Filed Opin. on #33,387—Motion to convene a three-judge court is denied. Pltffs motion for preliminary injunction is also denied. So ordered-McLean, J. mailed notice.

Apr. 25-67. Filed pltffs' notice of appeal—mailed copy to Louis J. Lefkowitz.

May 29-67. Filed certification of record on appeal.

Aug. 10-67. Filed deft's Answer.

Oct. 18-67. Filed USCA order affirming the order of the U. S. District Court. Judgment entered—Clerk (mailed notice).

Mar. 28-68. Filed True copy of Order and Opinion of USCA that the order of said District Court is reversed and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this court—Judgment entered 3-28-68 Clerk—ent. 3-28-68 m/n.

Mar. 28-68. Filed copy of Order of Supreme Court of U. S.—Ordered that the judgment of this court of Sept. 27, 1967 and the mandate issued thereunder be and they hereby are vacated and that the appellants shall recover from the appellees one hundred dollars $100.00 for their costs in the Supreme Court of the U. S. docketed as judgment #69,219 on March 28, 1969 m/n.

Apr. 1-68. Filed Pltff. Notice of Motion for Summary Judgment ret. 4-23-68 and affdvt. of John R. Vintilla.

June 7-68. Filed Order—Designation of Judges—Having been notified by the Hon. E. C. McLean USDJ for the So. Dist. of N. Y. that an application has been filed in the above matter for relief pursuant to Title 28 US Code Sec. 2281, pursuant to Title 28 U. S. Code Section 2284 I hereby designate the following judges, in addition to the Hon. Edward C. McLean, to hear and determine said cause as provided by law: Hon. Irving R. Kaufman, U. S. Circuit Judge, and Hon. Chas. H. Tenney, U. S. Judge for the Southern District of New York. It is hereby ordered that this order be filed in the above entitled cause

in the said District Court—J. Edward Lumbard Chief Judge, U. S. Court of Appeals for the Second Circuit m/n.

June 14-68. Filed Affdvt. and Notice of Motion ret. 6-20-68 10:30 A.M. for an order granting leave to the law firm of Wolf Popper Ross & Jones to file briefs amicus curiae and to permit amicus curiae to participate in the oral argument of the within appeal, etc. (Wolf Popper Ross Wolf & Jones).

June 14-68. Filed Order—Pltffs. Motion for summary judgment will be heard before the court of 3 judges on June 25, 1968 10 A.M. Room 1106. All briefs in support of and in opposition to the motion shall be served and filed not later than 6-20-68. The parties shall fully comply with Rule 25 of the Gen. Rules of this Court—So ordered—McLean, J. m/n.

June 17-68. Filed Notice of Three Judge Court composed of Hon. Irving R. Kaufman, U. S. Circuit Judge the Hon. Charles H. Tenney and the Hon. Edward C. McLean, U. S. District Judges. re: that an order dated June 11, 1968 made by the Hon. Edward C. McLean, a hearing has been set for the 25th day of June, 1968, 10 A.M. Room 1106 U. S. Dist. Court—Clerk John J. Olear, Jr.

June 19-68. Filed Deft. Opposing Affdvt. (Daniel M. Cohen) in opposition to the motion made by the law firm of Wolf Popper Ross Wolf & Jones "to file briefs amicus curiae and to permit said amicus curiae to participate in the oral argument of the within appeal, etc. The motion dated June 14, 1968 has been made ret. 6-20-68.

June 20-68. Filed Brief on behalf of Amicus Curiae Wolf Popper Ross Wolf & Jones.

June 20-68. Filed Brief of Plaintiffs in support of motion for Summary Judgment.

June 21-68. Filed Defts. Supplemental Opposing Affdvt. of Attorney General in opposition to motion for summary judgment which is ret. 6-25-68.

June 25-68. Before Hon. Irving R. Kaufman, U. S. Circuit Judge, Before Hon. Edward C. McLean, U. S. District Judge, Before Hon. Charles H. Tenney, U. S. District

Judge, Non-Jury—Hearing Begun and concluded—De
sion reserved.

June 28-68. Filed transcript of record of proce
ings—June 25, 1968.

Dec. 20-68. Filed transcript of record of proce
ings—June 25, 1968.

Dec. 20-68. Filed Opinion #35452, Three-jud
Court, Before Kaufman, Circuit Judge, McLean, D.J. a
Tenney, D.J. denying plaintiffs motion for summary ju
ment. So ordered.

COMPLAINT IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

(Filed December 28, 1966; title omitted in printing.)

Plaintiffs, complaining of the defendants, allege:

1. The jurisdiction of this Court is invoked un
Title 28, United States Code, Section 1331, and also un
Title 28, United States Code, Section 2281, being a s
in equity to challenge the constitutionality of Section 26
of the New York Surrogate's Court Act and the pol
predicated on the authority of such statute, and to enj
the enforcement of the statute on the ground that it v
lates the rights secured to the plaintiff and others si
larly situated under the Constitution of the United Sta
and that the Statute infringes upon the exclusive powe
the Federal Government over foreign affairs, as here
after more fully appears.

2. The Surrogate's Court Act, Section 269-a, provi
as follows:

> "Where it shall appear that a legatee, distributee
> beneficiary of a trust would not have the benefit
> use or control of the money or other property
> him, or where other special circumstances mak
> appear desirable that such payment should be wi
> held the decree may direct that such money or ot

property be paid into the surrogate's court for the benefit of such legatee, distributee, beneficiary of a trust, or such person or persons who may thereafter appear to be entitled thereto. Such money or other property so paid into court shall be paid out only by the special order of the surrogate or pursuant to the judgment of a court of competent jurisdiction."

Surrogate's Court Act, Section 269-a(1).

3. Plaintiffs are nationals of Romania, and are residents and domiciled in said state. They bring this action on behalf of themselves and all other residents of Romania, similarly situated with respect to the matters here involved. They are so numerous as to make it impracticable to bring them all before the Court. There being identical or same questions of law and fact, a common relief being sought as will hereinafter more fully appear, plaintiffs bring this action as a class suit, pursuant to Rule 23(a) of the Federal Rules of Civil Procedure:

4. The defendants, Joseph A. Cox, S. Samuel DiFalco, Edward S. Silver, Christopher C. McGrath, John T. Clancy are the duly elected, qualified and acting judges of the Surrogate's Courts of New York, Kings, Bronx and Queens Counties, respectively.

5. The defendant, Arthur Levitt, is the duly appointed, qualified and acting Comptroller of the State of New York, and that as such officer he has in his possession and/or under his control, funds belonging to plaintiff, Iuliu Nasta, and other residents of Romania. That he has refused and continues to refuse to honor the claim of and to pay the funds belonging to the plaintiff, Iuliu Nasta, and continues to refuse to honor the claim of any Romanian national, on the basis of the existing policy of the state of New York not to effect payments to residents of certain Eastern European Countries including Romania, and that he refuses to make any payments until such time as those who are entitled to said payment are without the jurisdiction of Romania.

6. That the Surrogates of Bronx and New York counties have ordered the withholding of distribution to the plaintiffs, Anghel Goldstein and Gheorghe Fundi, distributees of the estate of Maurice Siegel, File No. 687 A—1950, and Jerotheos Stavrou, File No. P. 3152—1963, without notice or any opportunity to be heard, and solely because of the existing policy of the State of New York prohibiting the transfer of the funds to residents of Romania. It is the practice of these Surrogate-defendants in the settlement of the final account of an executor or administrator, to withhold the sum payable to a legatee or distributee in Romania and to order it deposited in court pursuant to Section 269-a of the Surrogate's Court Act.

7. The public policy of the State of New York governing the payment of the distributive shares of residents in Romania in decedent's estates, is predicated upon Section 269-a of the Surrogate's Court Act, and has been sustained by the Court of Appeals of New York in the Matter of Greenberg, motion for leave to appeal denied, December 30, 1965, 17 N. Y. 2d, 417, 46 Misc. 2d, 383, 24 App. Div. Rep. 2d, 435.

8. On February 19, 1951, the United States Treasury Department, pursuant to the authority vested in it by P. L. No. 828, Section 5, 54 Stat. 1036, 31 U. S. C. A., Section 123, issued Treasury Circular 655, listing twelve countries, including Romania, to which the forwarding of public funds, such as social security benefits and veteran's pensions, was prohibited. The Treasury Department concluded, therefore, that with respect to checks or warrants drawn against funds of the United States in favor of a Romanian national, local conditions in Romania were such that there was not a reasonable assurance that a payee in that country would actually receive payment or be able to negotiate the check or warrant for full value, Title 31, Section 211.3(a).

9. On March 30, 1960, an agreement relating to financial questions was concluded at Washington, D. C. between the governments of the United States and of

Romania. By virtue thereof, Romania was removed from the proscribed list of the United States Treasury Department of countries to which federal funds may not be transmitted, and furthermore, all federal regulations of a blocking nature regarding Romanian nationals were removed, 31 C. F. R. Section 211.2 (a), 25 Federal Regulations, pages 3456, 3526. The present official policy of the United States regarding payment of funds to persons resident in Romania, is set forth in the United States Treasury Regulation 655, as amended in April 1960, and now declares that there is a reasonable assurance that a payee in that area will actually receive checks or warrants drawn against funds of the United States, and will be able to negotiate them for full value. That ever since April of 1960, the United States has been remitted checks and warrants representing social security benefits, veterans pensions and other public funds to residents in Romania without any problem or difficulty as to the receipt, and use and control thereof by the recipient.

10. The policy of the State of New York, as applied to the residents of Romania, as hereinabove set forth, encroaches upon and impairs the effective exercise of the power to conduct foreign relations which is constitutionally vested in the Federal Government to the exclusion of the State of New York.

11. The authoritative conclusion by The Treasury Department of the United States that a reasonable assurance exists that a payee in Romania will actually receive the funds remitted to him and will be able to negotiate checks or warrants for full value, and the consequent transfer of public funds to residents in Romania since April of 1960, constitutes official Federal policy, and therefore, the policy of the State of New York in withholding distribution to heirs, legatees or beneficiaries in Romania is in direct conflict with and in violation of, and must give way to overriding federal policy.

12. That Section 269-a of the Surrogate's Court Act of New York, as applied by these defendants to the rights of

these plaintiffs and other residents of Romania, deprives them arbitrarily of their distributive shares, and constitutes an unconstitutional governmental interference without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

13. Defendants have established and are maintaining a policy and practice of denying residents of Romania their distributive shares, otherwise secured to them, solely, because of their place of residence, and that such practice unlawfully discriminates against the plaintiffs and others similarly situated of the equal protection of the laws guaranteed them by the Fourteenth Amendment insofar as the statute is applied only because of their place of residence.

14. That the defendants Surrogates and others have been withholding the distributive shares belonging to residents of Romania, pursuant to the aforementioned public policy of New York, for more than fifteen years, and the amount being withheld is in excess of one half million dollars.

15. Many of the plaintiffs and others similarly situated are in dire need and/or aged and desperately in need of these funds. A delay in ascertaining and determining the rights of the plaintiffs, and others similarly situated and affected, on whose behalf this suit is brought, will result in further denial and deprivation of their rights in the indefinite future by reason of the acts herein complained of. There is no other remedy afforded by law or statute against the illegal acts and conduct of the defendants, save the equity powers of this Court, and unless the relief prayed for is granted.

WHEREFORE, plaintiffs pray that a three judge court be convened, pursuant to Title 28 U. S. C., Section 2281, and for the following relief:

1. That this Court enter a judgment or decree declaring that the policy and practice of the defendants in denying these plaintiffs and others similarly situated the right to their distributive shares from decedent's estates and to

other funds to which they are entitled on account of their residence in Romania is a denial of the rights secured to them by the Fifth and Fourteenth Amendments to the United States Constitution and, therefore, unconstitutional and void.

2. That Section 269-a of the Surrogate's Act of New York, as applied by the defendants to the rights of these plaintiffs and others similarly affected, be declared unconstitutional.

3. That this Court issue a permanent injunction forever restraining and enjoining the defendants and each of them, their agents and employees, from denying plaintiffs, and others similarly situated the right to their distributive shares from decedents' estates, and to other funds to which they may be entitled; that the defendants, and each of them, their agents, and employees, be ordered and directed to take such action as shall be necessary to deliver the distributive shares and other funds which are due and owing to and being withheld from these plaintiffs and others similarly situated.

4. That pending the final hearing and determination of this complaint upon its merits, the Court issue a preliminary injunction, restraining the defendants and each of them, their agents, and employees, from denying the plaintiffs, and others similarly situated, the right to their distributive shares and other funds to which they may be entitled.

5. For such other and further relief which this Court may deem proper.

MOTION FOR SUMMARY JUDGMENT WITH AFFIDAVIT IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

(Filed April 1, 1968; title omitted in printing.)

Plaintiffs move the court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiffs' favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law; and, especially, in the light of *Zschernig v. Miller*, 36 L. W. 4120 (1/15/68), decided by the Supreme Court of the United States.

The Affidavit of John R. Vintilla is attached hereto in support of this motion.

JOHN R. VINTILLA,
EMANUEL ESCHWEGE,
NOVAK N. MARKU,
Attorneys for Plaintiffs.

AFFIDAVIT OF JOHN R. VINTILLA.

STATE OF OHIO,
COUNTY OF CUYAHOGA, SS.

John R. Vintilla, being duly sworn, says:

1. He is one of the attorneys for the plaintiffs herein.

2. That he has handled and appeared in similar matters wherein the rights of romanian nationals were involved throughout the United States.

3. The policy of the State of New York, which plaintiffs challenge as unconstitutional, is accurately set forth by the following:

a.) Defendant, Edward Silver, Surrogate of King's County, in his reply of October 15, 1965 (Appendix III annexed hereto) to a request addressed to him by an heir

in Romania for the release and immediate payment of his distributive share in the modest amount of $2,989.63 (R. Reply Affidavit of John R. Vintilla), wrote, pertinent hereto, as follows:

"I have given serious consideration to your letter of August 28, 1965, in which you request the release of your distributive share in the above estate. It is the public policy of the State of New York to withhold distribution to legatees who would not have the benefit or use or control of their bequest. The Appellate Courts of this State have held that residents of Rumania are within this description. As a Judge of the Surrogate's Court, I am bound by the ruling of the higher court, and as an individual I am in full agreement with it. Accordingly, and despite my personal desire to help you because of your advanced age, physical infirmity and need for the money, I must advise you that if formal application for the payment of your bequest in full is made to me, I would be constrained to deny the same."

b.) Defendant, Arthur Levitt, wrote, relevant hereto, to several romanian claimants and affiant in connection with the release and payment of funds being withheld by his office, the following:

"Upon the basis of the documentation you have submitted we have conferred with our Legal Division and as a result we are of the opinion that you have established yourself as the owner of the funds involved. We regret to say however, that at the present time pursuant to a policy recommended by our Attorney General, we are not able to effect payments to residents of certain Eastern European Countries including Roumania because the situation exists which makes it doubtful as to whether the recipients of our checks would receive full value for the dollar amount thereof." (28 February, 1962, Appendix I.)

"We have given your letter careful consideration together with the documentation forwarded there-

with. We are advised that the Department of Law is aware of the removal of Romania from the list of countries contained in Treasury Circular 655. The Department of Law however has advised us that it will continue its position as to payments to distributees domiciled in Romania. A recent decision in the Surrogate's Court, New York County (Matter of Greenberg, New York Law Journal, June 16, 1964) upheld the position of the Attorney General of this State. Presumably this case will be appealed but until a reversal is had we must hold to the position taken in our letter to your client of February 28, 1962." (16 November, 1964, Appendix II.)

"* * *, we are not approving any claims payable to residents of Roumania who are within the jurisdiction of the Soviet Government." (June 6, 1962, Appendix IV.)

"* * *, our position in allowing refunds, on claims held by residents of Roumania has not changed and any action that you take at this time to obtain such a refund would be entirely at your own risk and also that of the claimants as we would not make any payments until such time as those who are entitled to said payments are without the jurisdiction of Roumania." (June 15, 1966, Appendix V.)

"We regret to inform you, however, that inasmuch as you represent a Rumanian National who claims to be entitled to the above estate, payment of the above captioned item may not in any event be made to him under existing policy and regulations until such time as it is believed such Rumanian Nationals will be enabled to have the full use or benefit of such funds as may be transmitted to them." (June 13, 1962, Appendix VI.)

"Please be advised that notwithstanding any present Federal regulations in reference to the transmission of money to private individuals residing in countries within the jurisdiction of the Soviet Union, the

policy of this Department is to withhold any such payments until and when the parties residing within such countries are outside of the jurisdiction of the Soviet Union." (July 6, 1962, Appendix VII.)

"We regret to advise, notwithstanding the numerous citations set forth in your letter, that this department will not honor any claims from Rumanian nationals as of the present time." (March 4, 1963, Appendix VIII.)

4. The most recent pronouncement of the New York courts with regard to the rights of nationals and residents of Romania to receive the proceeds from New York estates or other funds due them is the case of *In Re Greenberg*, 46 Misc. 883, 261 N.Y.S. 2d 176 (Surr. Ct. 1964), aff'd 24 App. Div. 2d 435 (1st Department, 1965) leave to appeal denied, 17 N.Y. 2d 417 (December 30, 1965); Defendant Joseph A. Cox, Surrogate of New York County, refused payment to the legatee in Romania in *Greenberg*, and, among the reasons for his action, stated in his opinion:

"The burden of establishing that the Rumanian national would have the benefit or use or control of the money or other property due him was upon the attorneys in fact (Surrogate's Ct. Act, ss. 269-a). The evidence offered to meet this burden consisted primarily of testimony of an officer of the Rumanian Legation in Washington who stated that by reason of his employment for four years as a lawyer he had become an expert in the estate law of Rumania. This witness testified that a Rumanian resident receives his inheritance in Rumanian currency at the rate of 12 lei for each dollar, which is twice the government controlled rate of exchange for commercial transactions. This witness also testified as to the free use of such money within Rumania although it could not be transmitted outside of that country. The testimony was that a Rumanian must notify the State Bank of any inheritance and must act through an attorney in fact in the collection of the money.

It must be recognized that, whether or not Rumania imposes restrictions within the meaning of section 269-a, it is an iron curtain country under Soviet dominance and, for such reason, facts either as to the operation of Rumanian laws or that country's monetary practices are not available to an inquirer who might be regarded as influenced by capitalist doctrines. It would appear that this was the unfortunate position in which the Attorney General found himself. The Attorney General was able to offer evidence of certain restrictive provisions of Rumanian law governing the ownership and use of property generally and these restrictions are well recognized as consistent with the Communist program of subordinating individual freedom for the material advancement of the Communist state. However, these restrictions do not seem to be peculiar to beneficiaries of foreign inheritances. While the attorneys in fact for the Rumanian national make much of the preferential exchange rate purportedly applicable to foreign inheritances, this argument is premised upon the assumption that an exchange rate of double that available in certain commercial transactions within Rumania is necessarily fair. This assumption can only be as sound as its premise, which is that the normal rate of exchange embodies a modicum of fairness. Casting grave doubt upon the usefulness of this formula is the established fact that Rumanian lei are procurable in this country at a rate of 31¾ lei to the dollar. Upon this basis the rate of exchange applicable to foreign legacies must be regarded as confiscatory and it cannot be validly contended that a Rumanian who would forfeit such a large portion of his legacy is receiving the benefit or use of $150,000."

5. The appellate court, in affirming the order of Surrogate Cox in *Greenberg*, declared:

"* * * The substantial differential between the Romanian internal rate of exchange applicable to estate distributions received from foreign countries and the

external rate of exchange establishes that the distributee 'would not have the benefit or use or control of the money or other property due him," as required by section 269-a of the Surrogate's Court Act. With respect to the other circumstances in Romania affecting the distributee's interest in view of the large sum of money involved ($120,797.69), and the distributee's failure to make a personal appearance to testify in support of his own claim, there is grave doubt additionally, that he will have the benefit, use or control of the money or property."

6. The defendant, Surrogate Samuel DiFalco, in the estate of Jerotheos Stavrou, in which plaintiff, George Fundi is a distributee, in settling said estate, ordered (NYLJ, 8/3/65), pertinent hereto, as follows:

"Any sum payable to legatees or distributees in Rumania will be deposited in court pursuant to section 269-a of the Surrogate's Court Act (Matter of Greenberg, NYLJ, June 16, 1964 (Cox, S.), aff'd App. Div. 1st Dept, NYLJ)."

7. The defendant, Surrogate Silver, in construing the will in the *Matter of the Estate of Mary Moroson* entered the following order (N. Y. L. J. 5/12/65):

"The shares of the distributees, who are Romanian Nationals, will be deposited with the director of finance of the City of New York pursuant to section 269-a of the surrogate's court act (Matter of Greenberg, NYLJ June 16, 1964, p. 14, cols. 3-4 (Cox, S)). Settle decree."

8. The Surrogate, in the judicial settlement in the *Estate of Maurice Siegel,* wherein the rights of plaintiff, Anghel Goldstein are involved, decreed:

"Ordered, Adjudged and Decreed that the distributive share to which the said Angel Goldstein is entitled be paid into this Court by depositing the sum of $2,230.40 with the Treasurer of the City of New York to the credit of this proceeding, and the Treasurer

of the City of New York hereby is directed to deposit said sum of $2,230.40 in any savings bank located in the County of Bronx for the benefit of said Angel Goldstein and subject to the further order of this court, and it is further"

10. According to the decision of the Supreme Court of the United States in *Zschernig,* the history and operation of the New York statute, as hereinabove shown, "make clear that (Section 269-a) is an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." Mr. Justice Douglas, in the majority opinion of the Court in the *Zschernig* case stated, "as one reads the Oregon decisions, it seems clear that foreign policy attitudes, the freezing or thawing of the 'cold war,' and the like are the real desiderata." And, as a footnote to this statement, the opinion of the Court recites: "Such attitudes are not confined to the Oregon courts. Representative samples from other States would include statements in the New York courts, * * *." In commenting upon such statements and attitudes of the state courts in their application of the "Iron-Curtain" statute, Mr. Justice Douglas further declared: "* * * Yet they, of course are matters for the Federal Government, not for local probate courts."

11. Mr. Justice Stewart, in a concurring opinion joined by Mr. Justice Brennan, in *Zschernig,* reviewed the provisions of the Oregon "iron-curtain" statute, one of which is similar substantially with the statute hereunder attack ("benefit, use and control"), and commented, as follows: "I believe that all three of the statutory requirements on their face are contrary to the Constitution of the United States. In my view, *each* of the three provisions of the Oregon law suffers from the same fatal infirmity. *All three launch the State upon a prohibited voyage into a domain of exclusively federal competence.* Any realistic attempt to apply any of the three criteria would necessarily involve the Oregon courts in an evaluation, either expressed or implied, of the administration of foreign law, the credibility of foreign diplomatic statements, and the

policies of foreign governments. Of course state courts must routinely construe foreign law in the resolution of controversies properly before them, *but here the courts of Oregon are thrust into these inquiries only because the Oregon legislature has framed its inheritance laws to the prejudice of nations whose policies it disapproves and thus has trespassed upon an area where the Constitution contemplates that only the National Government shall operate.*" (Emphasis supplied.) A substitution of New York in the place of Oregon in the foregoing declaration readily reveals that New York statute "suffers from the same fatal infirmity."

WHEREFORE, Deponent submits that the Surrogate's Court Act, Section 269-a, is invalid and unconstitutional, and respectfully requests that the relief prayed for in the complaint herein be granted.

JOHN R. VINTILLA.

(Jurat omitted in printing.)

AFFIDAVIT IN OPPOSITION TO ASSUMPTION OF JURISDICTION BY A SINGLE DISTRICT COURT JUDGE IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

(Title omitted in printing.)

STATE OF NEW YORK,
COUNTY OF NEW YORK, SS.:

DANIEL M. COHEN, being duly sworn, deposes and says:

1. He is an Assistant Attorney General of the State of New York, who is familiar with this case and makes this affidavit in opposition to the plaintiffs' motion for summary judgment which was returnable April 23, 1968 before a single judge sitting in the motion part of this Court.

2. At the outset, this Court's attention must be drawn to the fact that on March 8, 1968, the United States Court of Appeals for the Second Circuit (Moore, Smith and Kaufman, Circuit Judges), handed down the following decision (Docket No. 31396), which, after reciting the statute whose constitutionality is here involved and the prior history of this case, remanded it to a three-judge court:

"PER CURIAM:

Appellants, nationals and residents of Rumania, brought this action seeking an injunction restraining five New York surrogates from enforcing section 269-a of the New York Surrogate's Court Act on the ground that it is unconstitutional as applied to them. Section 269-a provides:

1. Where it shall appear that a legatee, distributee or beneficiary of a trust would not have the benefit or use or control of the money or other property due him, or where other special circumstances make it appear desirable that such payments should be withheld, the decree may direct that such money or other property be paid into the surrogate's court for the benefit of such legatee, distributee, beneficiary of a trust or such person or persons who may thereafter appear to be entitled thereto. Such money or other property so paid into court shall be paid out only by the special order of the surrogate or pursuant to the judgment of a court of competent jurisdiction.

2. In any such proceeding, where it is uncertain that an alien legatee, distributee or beneficiary of a trust, not residing within the United States or its territories, would have the benefit or use or control of the money or other property due him, the burden of proving that such alien legatee, distributee or beneficiary of a trust will receive the benefit or use or control of the money or other property due him shall be upon him or on the person or persons claiming from, through or under him.

The appellants' motion for the convening of a three-judge court under 28 U.S.C. § 2281, and for a preliminary injunction, was denied and they appealed to this court.

On September 27, 1967, this court affirmed in open court the order of the court below. Our decision was vacated by the Supreme Court, ____ U.S. ____ [36 L. W. 3285 (1/15/68)], and remanded for further consideration in light of *Zschernig v. Miller,* ____ U.S. ____ [36 L. W. 4120 (1/15/68)], in which the Court interpreted *Clark v. Allen,* 331 U.S. 503 (1947), as being 'concerned with the words of a [state] statute on its face, not the manner of its application,' and held that the 'history and operation' of a similar Oregon statute constituted 'an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress,' at 4121.

Upon reconsideration, we reverse the order of the district court and remand for consideration of the constitutional issues by a three-judge court pursuant to 28 U.S.C. § 2281."

3. The present status of the case, therefore, by reason of the Court of Appeals order of March 8, 1968, is that it has been remanded "for consideration of the constitutional issues *by a three-judge court* pursuant to 28 U.S.C. § 2281" (Emphasis supplied). Consideration of the present motion by a *single judge* would, under the circumstances detailed above, be beyond the power of a single judge and would be *improper*. As of the date of this affidavit, deponent has not been informed of the designation of a three-judge court.

4. When a three-judge Court has been designated and has been convened, that Court may deem it *essential* to the proper disposition of the constitutional issues presented to hold a hearing with relation to those issues. The pleadings and allegations contained in affidavits now on file in this Court, including those filed with reference to the instant motion, may not provide an adequate basis for decision of

the constitutional issues here involved. Further pleadings, applications and even the taking of testimony and the presentation of other proof may be deemed necessary.

5. Plaintiffs have named only the Judges of the Surrogate's Court of certain of the New York City counties as defendants in this case. Not even all the judges of the Surrogate's Courts elected or designated to sit within New York City's five counties have been made parties to this suit. None of the judges of the Surrogate's Courts of the State's other 57 counties has been brought in.

6. The very form of this action, against selected judges of the Surrogate's Court, should lead this Court to question whether the plaintiffs should not be restricted to a state-court forum which is available to them for direct review, by appeal, upon the same constitutional grounds urged here by them from any state-court decisions that may have been handed down by those judges withholding payment from them of legacies, beneficial interest or distributive shares.

7. Actually, the reason for plaintiffs' resort to this Court, and more particularly, for their current effort to avoid a hearing even before *the three-judge Court which they themselves have invoked* is that the evidence will show that our New York statute is not only constitutional on its face, but has been and is being applied in a constitutional manner. New York's statute differs, in both its terms and effect, from the Oregon statute considered in the *Zschernig* case mentioned (*supra*) in the Court of Appeals opinion. In effect, what the plaintiffs seek to avoid both by this action and this motion is a case-by-case scrutiny of their claims by state court judges who have been conscientiously and carefully inquiring into the possibility, in each case brought before them, of whether nonresident legatees, devisees, beneficiaries or even distributees may be able actually to receive the beneficial enjoyment of the shares of New York's decedent's estates which New York decedents intended or are deemed to have intended them to enjoy.

WHEREFORE, deponent respectfully requests that the plaintiffs' motion for summary judgment addressed to a single District Court Judge at Motion term be denied; or that, in lieu of the relief sought by the plaintiffs, this matter be transferred for consideration of the constitutional issues involved herein by a three-judge court as directed by the Court of Appeals for this Circuit on March 8, 1968.

DANIEL M. COHEN.

(Jurat omitted in printing.)

SUPPLEMENTAL AFFIDAVIT OF ATTORNEY GENERAL IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

(Filed June 19, 1968, title omitted in printing.)

STATE OF NEW YORK,
COUNTY OF NEW YORK, SS.

DANIEL M. COHEN, being duly sworn, deposes and says:

1. This affidavit is submitted to supplement a prior affidavit by Daniel M. Cohen, sworn to April 24, 1968, submitted by the Attorney General in opposition to a motion made by the plaintiffs for summary judgment returnable before a single District Court Judge. The Attorney General's affidavit, in "opposition to the assumption of jurisdiction by a single District Court Judge" set forth certain facts pertinent to the disposition of such a motion, even by a three-judge Court.

2. This supplemental affidavit is submitted to the Court, pursuant to the order of District Court Judge Edward C. McLean, dated June 13, 1968, received June 17, 1968, by the Attorney General, notifying the parties that "plaintiffs' motion for summary judgment will be heard

before the Court of three judges duly designated herein on June 25, 1968" and requiring all papers to be filed by June 20, 1968. The purpose of this supplemental affidavit is to furnish additional proof that there are *issues of fact* with reference to the "application" of the terms of the New York statute here involved (Surrogate's Court Act, § 269-a, now Surrogate's Court Procedure Act, § 2218), which, in any event, prevent the granting of the relief sought by the plaintiffs herein—a declaration of the unconstitutionality of the New York statute and an injunction against its application by the Surrogates named as defendants in this law suit.

3. Reference has already been made in deponent's affidavit of April 24, 1968 to the fact that only certain judges of the Surrogate's Court of specific counties in the City of New York have been made defendants in this case (Par. 5). It must be evident that any misapplication of this statute by these judges is reviewable not only by the Appellate Divisions of the First and Second Judicial Departments but also by the Court of Appeals of the State of New York. It has already been suggested that the plaintiff should be restricted, in the review of the decision of these judges, to state court forums which afford them direct review by appeal (Par. 6). Those forums have indicated no hesitancy in passing upon constitutional questions of the same nature as those urged as a basis for the maintenance of this action. (See, *Matter of Laikind* [decided June 14, 1968 by the Court of Appeals of the State of New York], 22 N.Y. 2d.)

A copy of the Court of Appeals decision in the *Laikind* case is annexed hereto (Exhibit "A").

4. We have also already suggested to this Court that the purpose of this motion is to avoid a hearing at which evidence can be shown that our New York statute, which is constitutional on its face, has been and is being applied in a constitutional manner; and the purpose of this action is to avoid a case-by-case scrutiny of the claims of nonresidents by state court judges who have been conscien-

tiously and carefully inquiring into the possibility, in each case brought before them of whether such non-resident legatees, devisees, beneficiaries or distributees may actually be able to receive the beneficial enjoyment of the shares of New York's decedents' estates which those decedents intended or have deemed to intend such non-resident persons to enjoy (April 24, 1968 affidavit; Par. 7).

5. This motion for summary judgment is predicated upon the erroneous assumption that its disposition is controlled by the decision of the United States Supreme Court in *Zschernig v. Miller,* 389 U.S. 429. Upon the same erroneous assumption a motion for rehearing was made in *Matter of Ioannou,* 371 U.S. 30, to obtain a rehearing of the appeal in that case. The petition for rehearing in *Ioannou* was denied upon representations made by the State Attorney General that further procedure was available in the New York State courts by way of a new application for withdrawal for the funds involved in *Ioannou* upon the basis of allegations of changed circumstances (of which the decision in *Zschernig* was but a single circumstance). On that basis, a new application for withdrawal has been made by the petitioner Ioannou; but the complexity of the situation facing the state courts in these matters is evidenced by the fact that in the *Ioannou* case, a conflicting claim to the same fund has also been filed *by an alleged attorney-in-fact of Viktoria Miculka, the distributee who had allegedly also executed an assignment of her distributive share at the American Embassy in Prague to Ioannou, her niece, who lived in London.* Since we do not deem it essential at this stage of the proceeding, in connection with this motion, we shall not encumber these papers with the details of complexities arising or that have arisen in connection with similar cases involving the claims of non-residents. The *Ioannou* decision and the details of that case have been referred to merely to demonstrate that the Supreme Court itself did not feel compelled to reverse or overrule its prior decision, made in 1962 in relation to the New York statute because

of its decision in 1968 with relation to the Oregon statute involved in the *Zschernig* case. The Supreme Court, of course, cited its decision in *Zschernig,* but used the restrictive word "see" in its reference to that decision, as well as in its reference to its decision remanding this case to the Court of Appeals on the question of convening a three-judge Court (Exhibit "B," decided June 3, 1968).

6. We have already referred to the very recent decision of the New York Court of Appeals in *Matter of Laikind,* 22 N.Y. 2d , decided June 14, 1968. The very same question which is presented to this Court was presented to the New York Court of Appeals—"whether the impounding of the funds here violated the federal constitution under the ruling of the *Zschernig* case" (Exhibit "A," p. 3). Writing for a majority of the Court, Judge Breitel recognized that in *Zschernig* the Supreme Court had considered the constitutionality of an Oregon statute "similar in some respects to the New York statute." He noted, however, that "Despite some similarities, the Oregon and New York statutes are different" (Exhibit "A," p. 4). He observed that the New York statute, unlike the one in Oregon, contained no provision for reciprocity or escheat, a matter which might be of little help in resolving the issues of that case. He further observed, however, that (Exhibit "A," p. 4):

> "the absence of an escheat provision in the New York statute, even though the Oregon escheat provision was not discussed or made a ground of decision by the Supreme Court, may be of the critical importance in sustaining the validity of New York's statute, at least on its face."

In *Laikind,* Judge Breitel also noted (Exhibit "A," p. 4):

> "Moreover, the majority opinion in the *Zschernig* case, in accepting the constitutionality of 'reciprocity,' arguably accepted 'benefit, use or control' provisions as valid, provided state courts did no more than 'routinely read' foreign laws and provided there was

no palpable interference with foreign relations in their application."

In a footnote, Judge Breitel observed the fact that in *Zschernig,* Justices Stewart and Brennan had, in a concurring opinion, found the Oregon statute unconstitutional on its face. Judge Breitel relegated to a later case the possibility that the Supreme Court might hold "that in reality no such statute could ever be restricted to a 'routine reading' " (Exhibit "A").

On this subject Judge Breitel, in the *Laikind* case, concluded by holding the following:

"if the courts of this State, in applying the 'benefit or use or control' requirements, simply determine, without animadversions, whether or not a foreign country, by statute or otherwise, prevents its residents from actually sharing in the estates of New York decedents, the statute would not be unconstitutional under the explicit rationale of the *Zschernig* case."

He further observed (Exhibit "A," p. 5):

"Indeed, petitioner has made no showing that the lower courts in this case have currently engaged in the conduct criticized, and additionally illustrated in the footnotes of the *Zschernig* case, as interference with foreign relations. Consequently, there is no present warrant to reconsider the earlier rulings of this Court sustaining the constitutionality of the statutes which preceded the present one (*Matter of Marek,* 11 N.Y. 2d 740, app. dism. *sub nom. Ioannou v. New York,* 371 U. S. 30 [for want of a substantial federal question]. *Matter of Braier,* 305 N.Y. 148, 156 app. dism. *sub nom. Kalmane v. Greene,* 346 U. S. 892)."

In connection with another aspect of the *Laikind* case, the Court of Appeals held (Exhibit "A," p. 5):

"the applicable New York statute does not necessarily require that the funds be restricted until it is deter-

mined that the beneficiary himself will have 'benefit or use or control' of them. The funds are also impounded 'for the benefit * * * such person or persons who may thereafter appear to be entitled thereto.' "

7. The movants' complete reliance upon the remand of this case "for further consideration in light of *Zschernig v. Miller,* is further evidenced by the letter of June 19, 1968, addressed to Judge McLean of this Court by movants' counsel, John R. Vintilla, in which he refers to that decision as a "clear mandate." Movants fail to recognize that the mandate did not direct a peremptory disposition of this case, but was a remand for *"further consideration."*

8. "Further consideration" of this case by the Court, requires more than a bare-bones comparison of the words of our New York statute with those of the Oregon statute involved in *Zschernig.* Particularly is this so since we have two decisions of the highest court of our State construing the terms of the New York statute, handed down as recently as June 14, 1968. Reference is made not only to the decision in *Matter of Laikind* (*supra*), but also to the decision in *Matter of Krasowski* (*supra*) in which the Court of Appeals (citing *Laikind*), denied the Attorney General's application for leave to appeal from a Third Department order directing transmission of an alien beneficiary's share to Poland.

9. Clearly, therefore, movants may not succeed on a comparison merely of the terms of the New York and Oregon statutes. Nor can they, when the United States Supreme Court itself predicated its decision not only on the terms of the Oregon statute, but on *Oregon's method of applying that statute,* render that statute or the Supreme Court's findings as to Oregon's method of application controlling as to the factual situation relating to the method of application of the New York statute.

10. As to the proper construction of the New York statute, this federal court should deem itself not only to

be persuaded, but guided by the construction given to the statute by the highest of our State Courts. See *Mayer v. Chase National Bank,* 233 F. 2d 468, 470 (2d Cir., 1956), where the Court of Appeals followed the Supreme Court direction made in *Erie R. Co. v. Tompkins,* 304 U. S. 64, to give respectful heed to the pronouncements even of "inferior state tribunals of record." In the *Mayer* case, this Circuit did not, as here, enjoy the advantage of any pronouncement by the New York Court of Appeals as to the proper construction to be given to the new York statute there cited for construction.

11. Indeed, it is clear that in *Laikind,* the Court of Appeals "considered" the statute here under attack in light of *Zschernig v. Miller.* It specifically found that no showing had been made in *Laikind* (Exh. "A," p. 5) that the lower courts in that case had "currently engaged in the conduct criticized, and additionally illustrated in the footnotes in the *Zschernig* case, as interference with foreign relations." It concluded, therefore, in *Laikind* that there was "no present warrant to reconsider the earlier rulings" of the New York Court of Appeals "sustaining the constitutionality of the statutes which preceded the present one (S.C.P.A., § 2218, formerly Surr. Ct. Act. § 269-a).

12. The original emphasis of the complaint in this action was placed upon the "possible conflict between the New York Statute and the new federal policy vis-a-vis Rumania as expressed in the 1960 agreement and subsequent federal regulations" (McLean, D.J., opinion of April 4, 1967). But for the decision in *Swift & Co. v. Wickham,* 382 U. S. 111, indicating that a three-judge Court should not be convened in a "supremacy" situation, Judge McLean might have convened a three-judge Court herein in 1967. The alleged conflict presented a question which he did not deem to have been "set at rest by the decisions cited above" [*Braier,* 305 N. Y. 148, app. dism. 346 U. S. 802 *sub nom. Kalmane v. Green; Marek,* 11 N. Y. 2d 740, app. dism. 371 U. S. 30 *sub nom. Ioannou*

v. New York; and *In re Greenberg,* 46 Misc. 2d 883, aff'd 24 A. D. 2d 435 1st Dept. (1965), leave den. 16 N. Y. 2d 417 (1965)]. But this question has, in effect, been settled by the Appellate Division in the Second Department in *Matter of Kina,* 29 A. D. 2d 563 (Dec., 1967), where the application for payment of funds was made by Polish distributees at a time after Poland had been removed by the United States Treasury Department from the list of countries to which federal checks and warrants might not be transmitted. Since the decision in *Kina* is officially reported, we need not reproduce it here.* Accordingly, even the basis depended upon by Judge McLean, in 1967, for deeming a substantial federal question to have been presented by the alleged conflict, the absence of a state court decision—no longer appears to be valid. This federal law suit should, therefore, be dismissed, for lack of substantiality.

13. Not to exhaust the subject, but merely to set forth examples, it may also be noted that even where the federal Treasury Regulation had *not* delisted a specific country, the New York courts had been directing transmission of payments to foreign residents to whom transmissions were found to be feasible. E.g., as to Czechoslovakia, see *Matter of Reidl,* 23 A.D. 2d 171 (1st Dept., 1965); *Matter of Karman,* 51 Misc. 2d 707 (Surr. Ct., Erie Co., 1966); *Matter of Matous,* 53 Misc. 2d 255 (Surr. Ct., West. Co., 1967); and see *Estates of Lehman, Szekac* and connected cases, 155 N.Y.L.J., No. 124, June 27, 1966, p. 13, Surr. Ct., N.Y. Co., *DiFalco,* Surr.). So that the New York courts, in their discretion, direct transmissions

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* An appeal taken to the New York Court of Appeals from the Appellate Division decision in *Kina* is subject to dismissal for lack of prosecution. Indeed, on June 14, 1967, the New York Court of Appeals ruled, in *Kina* (159 N.Y.L.J., No. 118, Tuesday, June 18, 1968, page 2):

"Motion, considered as a motion to preclude the appellants from serving and filing briefs on the appeal herein, granted unless the briefs are served and filed no later than August 1, 1968."

both in situations where a country has been delisted and also where a country still remains on the Treasury list. See the New York Times of June 17, 1968 (late City Ed. pp. one and eleven) indicating the consideration now being given by federal authorities to the subject of delisting of Czechoslovakia.

14. That the *Zschernig* case is not entitled to receive the broad, sweeping, construction contended for by the movants is evidenced even by the brief of the successful appellants in that case. It stated (p. 55):

> "It is also not deemed necessary to discuss the so-called "eastern" statutes—and the court decisions thereunder—which are not in fact confiscatory or punitive in their terms or effect but give the probate judges authority and discretion to withhold and defer actual delivery or payment of inheritances to foreign heirs until the court is satisfied that the foreign heir will in fact receive the full 'benefit, use or control' of the money or other property."

The appellants in *Zschernig* conceded to the Supreme Court that New York Surrogate's Court Act § 269-a was typical of such statutes (U.S. Sup. Ct. Brief, p. 55).

15. The decision in *Laikind* demonstrates that our highest state court, upon a proper record, is prepared to deal with the question of whether the New York Statute is being constitutionally applied. No reason has been shown by the movants to doubt the fact that, upon an appropriate record the New York Court of Appeals will endeavor to lend guidance to the lower courts of the State so that they will be able to ascertain what constitutes a "routine reading" of the laws of a foreign country and what procedures might amount to "palpable interference with foreign relations" in the application of our New York Statute. In *Laikind*, some guidance has been given already to the extent that the Court has stated (Exh. "A," p. 4):

> "if the courts of this State, in applying the 'benefit or use or control' requirements simply determine, with-

out animadversions, whether or not a foreign country, by statute or otherwise, prevents its residents from actually sharing in the estates of New York decedents, the statute would not be unconstitutional under the explicit rationale of the *Zschernig* case."

16. Finally, for the purposes of this motion, we must recall to this Court that the power of the States to regulate the succession and distribution of the estates of persons located within the individual States has long been recognized by our federal government. *United States v. Fox*, 94 U.S. 315 (1877). Indeed, in *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942), it was held that nothing in the federal Constitution prohibits our Legislature from limiting, conditioning or even abolishing the power of testamentary disposition of property within our jurisdiction. New York's power over the distribution of its decedents' estates has not been limited by any treaty referred to in the complaint. And the federal regulation—both listing and delisting referred to in the complaint and the moving papers—refer merely to the subject of the transmission of *federal funds*, not *private funds*. We are informed that the State Department does not regard the administration of estates to be a federal function and that it declines to make a judgment as to whether, particularly in certain Soviet states, Soviet heirs do receive benefit or use or actual enjoyment of estate shares. The State Department, we are informed, too, would expect the State Courts to determine, in the first instance, whether our New York Statute, in the light of the *Zschernig* decision, constitutes an unconstitutional intrusion into the field of foreign affairs.

WHEREFORE, *the motion for summary judgment should be denied and the complaint herein should be dismissed.*

DANIEL M. COHEN,
Assistant Attorney General.

(Jurat omitted in printing.)

EXHIBIT A.

STATE OF NEW YORK
COURT OF APPEALS

2. No. 152 68

In the Matter of
the Petition of Harry Laikind, to render and settle his Account as Administrator of Sam Leikind, Deceased,
Appellant-Respondent,

vs.

Attorney General of the State of New York,
Respondent-Appellant,

Davareh Kaminsky, & ors., &c.,
Defendants.

OPINION.
(22 N. Y. 2d 346.)

No. 66 Civil 4487

IN THE UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK.

ANGHEL GOLDSTEIN, aka Andrei Pietraru,
IULIU NASTA, aka Julius Nasta and
GHEORGHE FUNDI,
On behalf of themselves and all others similarly situated,
Plaintiffs,

vs.

JOSEPH A. COX and SAMUEL DiFALCO,
Surrogates of the County of New York,
EDWARD F. SILVER,
Surrogate of the County of Kings,
CHRISTOPHER C. McGRATH,
Surrogate of the County of Bronx,
JOHN T. CLANCY,
Surrogate of the County of Queens,
ARTHUR LEVITT,
Comptroller of the State of New York,
Defendants.

OPINION OF THE DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

(Filed December 20, 1968.)

McLEAN, *District Judge.*

The three plaintiffs in this action are nationals and residents of Rumania. They sue "on behalf of themselves and all other residents of Romania, similarly situated" for a judgment declaring that Section 2218 of the New York Surrogate's Court Procedure Act, formerly Section

269-a of the Surrogate's Court Act, is unconstitutional.* They also seek an injunction restraining five New York Surrogates and the Comptroller of the State of New York from enforcing and applying it.

The prior history of this action may be briefly stated.

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* This statute now reads as follows:

"1. (a) Where it shall appear that an alien legatee, distributee or beneficiary is domiciled or resident within a country to which checks or warrants drawn against funds of the United States may not be transmitted by reason of any executive order, regulation or similar determination of the United States government or any department or agency thereof, the court shall direct that the money or property to which such alien would otherwise be entitled shall be paid into court for the benefit of said alien or the person or persons who thereafter may appear to be entitled thereto. The money or property so paid into court shall be paid out only upon order of the surrogate or pursuant to the order or judgment of a court of competent jurisdiction.

(b) Any assignment of a fund which is required to be deposited pursuant to the provisions of paragraph one (a) of this section shall not be effective to confer upon the assignee any greater right to the delivery of the fund than the assignor would otherwise enjoy.

2. Where it shall appear that a beneficiary would not have the benefit or use or control of the money or other property due him or where other special circumstances make it desirable that such payment should be withheld the decree may direct that such money or property be paid into court for the benefit of the beneficiary or the person or persons who may thereafter appear entitled thereto. The money or property so paid into court shall be paid out only upon order of the court or pursuant to the order or judgment of a court of competent jurisdiction.

3. In any such proceeding where it is uncertain that an alien beneficiary or fiduciary not residing within the United States, the District of Columbia, the Commonwealth of Puerto Rico or a territory or possession of the United States would have the benefit or use or control of the money or property due him the burden of proving that the alien beneficiary will receive the benefit or use or control of the money or property due him shall be upon him or the person claiming from, through or under him."

Section 1 was added by Ch. 998 of the Laws of 1968 which became effective on June 22, 1968, after the motion now under consideration was made.

In the spring of 1967 plaintiffs moved for an order convening a three-judge court pursuant to 28 U.S.C. § 2281. They also moved for an injunction pendente lite. The district court denied the preliminary injunction. It also denied the request for a three-judge court on the ground that, although a substantial federal question was raised, this question was one of federal "supremacy" which, under *Swift & Co. v. Wickham,* 382 U. S. 111 (1965), was to be decided by one judge, not by three.

Goldstein v. Cox, 66 Civ. 4487 (S.D.N.Y. April 4, 1967).

On September 27, 1967, the Court of Appeals, from the bench, affirmed the order of the district court. The Supreme Court, however, vacated the order of the Court of Appeals and remanded the case to the Court of Appeals "for further consideration in light of *Zschernig v. Miller.*" (389 U.S. 429 (1968).)

Goldstein v. Cox, 389 U.S. 581 (1968).

The Court of Appeals thereupon reversed the order of the district court and remanded the case for consideration of the constitutional issues by a three-judge court.

Goldstein v. Cox, 391 F.2d 586 (2d Cir. 1968).

Plaintiffs then moved for summary judgment. That is the motion which we are now called upon to decide.

The motion is supported only by an affidavit of plaintiff's attorney which is devoted primarily to a discussion of the law. It contains few facts. As to plaintiff Goldstein, it says only:

> "The Surrogate, in the judicial settlement in the Estate of Maurice Siegel, wherein the rights of plaintiff, Anghel Goldstein are involved, decreed:
>
> 'Ordered, Adjudged and Decreed that the distributive share to which the said Angel Goldstein is entitled be paid into this Court by depositing the sum of $2,230.40 with the Treasurer of the City of New York to the credit of this proceeding, and the Treasurer of the City of New York hereby is di-

rected to deposit said sum of $2,230.40 in any savings bank located in the County of Bronx for the benefit of said Angel Goldstein and subject to the further order of this court, and it is further.' "

The affidavit contains a similar statement as to plaintiff Fundi, reading as follows:

"The defendant, Surrogate Samuel DiFalco, in the estate of Jerotheos Stavrou, in which plaintiff, George Fundi is a distributee, in settling said estate, ordered (NYLJ, 8/3/65), pertinent hereto, as follows:

'Any sum payable to legatees or distributees in Rumania will be deposited in court pursuant to section 269-a of the Surrogate's Court Act (Matter of Greenberg, NYLJ, June 16, 1964 (Cox, S.), aff'd App. Div. 1st Dept. NYLJ.' "

The text of the affidavit does not refer to plaintiff Nasta. Annexed to the affidavit, however, are copies of letters from the office of the New York Comptroller dated respectively February 28, 1962 and November 16, 1964, the first of which is addressed to Juliu Nasta in Bucharest, Rumania, and the second to plaintiffs' attorney. Each letter is captioned:

"NASTA, JULIU
Atty-in-Fact for
Opreana Comanicu
J. P. Morgan & Co.
Acct. BD#47801
Abandoned Property"

There is no explanation of what the "abandoned property" is, how it came to be abandoned, or whether it has any connection with the statute here under consideration. In each letter the Comptroller's Office stated in substance that pursuant to a policy recommended by the New York Attorney General, the Comptroller was not in a position to make payment of residents of Rumania.

The only other factual material submitted in support of this motion consists of a copy of a letter dated

October 15, 1965 from the then Surrogate of Kings County to Isac Silianu (not a plaintiff) in Bucharest, Rumania, and copies of five letters from the office of the New York Comptroller bearing various dates in 1962, 1963 and 1966, one of which is addressed to Borbala Barbieri (not a plaintiff) in Bucharest, Rumania, and the others to the same attorney who represents the plaintiffs in this action.

The Surrogate's letter stated in substance that if Isac Silianu were to make formal application for the payment of his bequest in full, the Surrogate would be constrained to deny it, but that the Surrogate would give "sympathetic consideration to a request for transmittal to you in periodic installments of small sums for purchase of food and clothing parcels, if a demonstration can be made of the feasibility thereof."

The Comptroller's letters were each headed "Abandoned Property." Two of them indicate that the property consists of an account in J. P. Morgan & Co. The other three refer to "Prunder, Denette, Estate of." In each letter the Comptroller's office in substance declined to pay a claim of a resident of Rumania or of individuals within the jurisdiction of the Soviet Union.

The motion is opposed by an affidavit of an Assistant Attorney General of New York. That affidavit is entirely argumentative. It can fairly be said to contain no facts at all.

On this record we are asked to hold as a matter of law that Section 2218 is unconstitutional because it interferes with the exclusive prerogative of the Federal government to conduct the foreign affairs of the United States. Plaintiffs claim that this result is required by the Supreme Court's decision in *Zschernig*.

The validity of the statute, as it read at the time, was twice upheld by the New York Court of appeals prior to *Zschernig*.

> *Matter of Braier*, 305 N.Y. 148 (1953), *appeal dismissed sub nom. Kalmane v. Green*, 346 U.S. 802 (1953);

Matter of Marek, 11 N.Y.2d 740 (1962), *appeal dismissed sub nom. Ioannou v. New York*, 371 U.S. 30 (1962).

In each case the Supreme Court dismissed the appeal from the New York Court of Appeals' decision for want of a substantial federal question. As far as appears from the Court of Appeals' opinion in *Braier* and from the memorandum in *Marek* (in which no opinion was written), the ground upon which the constitutionality of the statute is challenged in the present action was not raised or decided in either case.

Recently the unsuccessful claimant in *Marek* (Ioannou) moved in the Supreme Court for leave to file a petition for rehearing. The Supreme Court denied the motion "upon the representation of the Attorney General of New York that the movant may file a new application 'to withdraw the funds deposited with the New York City Treasurer' in the light of changed circumstances. See *Zschernig v. Miller*, 389 U.S. 429; *Goldstein v. Cox*, 389 U.S. 581."

Ioannou v. New York, 391 U.S. 604 (1968).

In *Zschernig*, the Supreme Court had before it an Oregon statute which provided in substance that property of an Oregon decedent which would otherwise pass by succession or testamentary disposition to a nonresident alien would, in the absence of other eligible heirs, devisees or legatees, escheat to the state of Oregon unless the alien proved (1) the existence of a reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the foreign country; (2) the right of United States citizens to receive payment here of funds from estates in the foreign country; and (3) the right of the alien to receive the benefit, use or control of the proceeds of Oregon estates, "without confiscation" by the government of his country. The Court held this statute unconstitutional because it impaired "the effective exercise of the Nation's foreign policy." 389 U.S. at 440.

Subsequent to this decision, the New York Court of Appeals again considered the constitutionality of Section 2218 and, despite *Zschernig,* declined to hold the statute unconstitutional on the record before it.

Matter of Leikind, 22 N.Y.2d 346 (1968).

We are called upon to decide whether, on the record now before us, we are impelled to a conclusion similar to, or different from, the conclusion which the New York Court of Appeals reached in *Leikind.*

The decision depends upon the reasons given by the Supreme Court in *Zschernig* for invalidating the Oregon statute. Before considering those reasons, however, mention must be made of an earlier Supreme Court decision, *Clark v. Allen,* 331 U.S. 503 (1947).

In *Clark,* the Court passed upon a California statute which contained reciprocal provisions substantially identical with the first two requirements in the Oregon statute, but which did not contain the benefit, use and control requirement. The Court upheld the constitutionality of the California statute as against a claim that it constituted an interference by the state of California in the field of foreign affairs.

In *Zschernig,* the Supreme Court expressly declined to overrule *Clark v. Allen.* Instead, it distinguished it, saying:

> "We were there concerned with the words of a statute on its face, not the manner of its application." 389 U.S. at 433.

The Court went on to point out that state courts frequently construe and apply the laws of foreign nations and that:

> "It has never been seriously suggested that state courts are precluded from performing that function, albeit there is a remote possibility that any holding may disturb a foreign nation * * *." 389 U.S. at 433.

But the Court said:

> "It now appears that in this reciprocity area under inheritance statutes, the probate courts of various States have launched inquiries into the type of governments that obtain in a particular foreign nation * * *." 389 U.S. at 433-34.

The Court pointed out that the Oregon statute added to the requirement of reciprocity a new concept of confiscation and that this had "led into minute inquiries concerning the actual administration of foreign law * * *." 389 U.S. at 435. The Court documented this statement by quoting intemperate remarks contained in opinions of state court judges, such as, "Russia kicks the United States in the teeth all the time," and the like. 389 U.S. n. 8 at 437. The Court said that the Oregon statute "as construed seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own." 389 U.S. at 440.

The Court concluded that:

> "It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way." 389 U.S. at 440.

On this basis the Court held the Oregon statute unconstitutional.

Two justices concurring in a separate opinion stated that, while joining the opinion of the Court, they would go further and hold the Oregon statute unconstitutional on its face. Obviously, it was manifest to these two justices, as it is to us, that the opinion of the Court did not go this far, but held only that the Oregon statute was unconstitutional because of the manner of its application.

In *Leikind,* the New York Court of Appeals read the opinion of the Court in *Zschernig* as a decision dealing with the application of the statute by the Oregon courts. The Court of Appeals held that in the case before it there was no showing that "the lower courts in this case have currently engaged in the conduct criticized, and addi-

tionally illustrated in the footnotes of the *Zschernig* case, as interference with foreign relations." Consequently, said the court, "there is no present warrant to reconsider the earlier rulings of this court sustaining the constitutionality of the statutes which preceded the present one [*i.e., Braier* and *Marek, supra*]." 22 N.Y. 2d at 352.

The Court of Appeals recognized the possibility that the Supreme Court might extend the *Zschernig* rule in the future. Thus, it said that in *Zschernig*, the Supreme Court "arguably accepted 'benefit, use or control' provisions as valid, provided State courts did no more than 'routinely read' foreign laws and provided there was no palpable interference with foreign relations in their application." 22 N.Y.2d at 351-52. But the court conceded that "the sweep of the opinion might suggest to some that in a later case the court might hold that in reality no such statute could ever be restricted to a 'routine reading.' " 22 N.Y.2d n. 2 at 352.

In the case before us there is no showing that the New York courts have engaged in the conduct criticized in *Zschernig*. There is no showing and not even any claim that the New York courts have uttered any animadversions concerning Rumania. All we are told is that two New York Surrogates have directed that the distributive shares of plaintiffs Goldstein and Fundi in New York estates be deposited in court, pursuant to the statute, and that the office of the New York Comptroller has declined to turn over certain "abandoned properties" to persons resident in Rumania or in territories within the jurisdiction of the Soviet Union. We are not informed as to what investigation, if any, preceded these judicial and administrative decisions.

We conclude that this record is inadequate to justify this court in holding, summarily, that Section 2218 is unconstitutional under the *Zschernig* rule. Without any evidence whatever as to how Section 2218 has been applied in this case, we are unable to say that it has been applied in such a way as to interfere with the foreign relations of the United States. We interpret the Supreme Court's

recent ruling denying a rehearing in *Ioannou* as at least an indication that evidence of improper application of the statute is necessary.

We appreciate that the Supreme Court may eventually go further than it has thus far gone and that it may eventually hold that all benefit, use and control statutes are invalid regardless of how the state courts have applied them. But we conceive it to be our duty to enforce the law as it is, not as it may be in the future.

Accordingly, the motion for summary judgment is denied.

So ordered.

IRVING R. KAUFMAN,
U. S. C. J.

EDWARD C. McLEAN,
U. S. D. J.

CHARLES TENNEY,
U. S. D. J.

Dated: December 18, 1968

Joseph A. Cox et al.

APPEAL from the United States District Court for the Southern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

April 28, 1969

Supreme Court of the United States

No. 1146 ---- , *October Term, 19* 68

Anghel Goldstein aka Andrei Pietraru,
et al.,

Appellants,

v.

FILE COPY

In the Supreme Court of the United States

Office-Supreme Court, U.S.
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JOHN F. DAVIS, CLERK

OCTOBER TERM, 1968.

No. [redacted] 66

ANGHEL GOLDSTEIN, aka Andrei Pietraru,
IULIU NASTA, aka Julius Nasta and
GHEORGHE FUNDI,
on behalf of themselves and all others similarly situated,

Appellants,

vs.

JOSEPH A. COX and SAMUEL DiFALCO,
Surrogates of the County of New York,
EDWARD F. SILVER,
Surrogate of the County of Kings,
CHRISTOPHER C. McGRATH,
Surrogate of the County of Bronx,
JOHN T. CLANCY,
Surrogate of the County of Queens,
ARTHUR LEVITT,
State Comptroller,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

JURISDICTIONAL STATEMENT.

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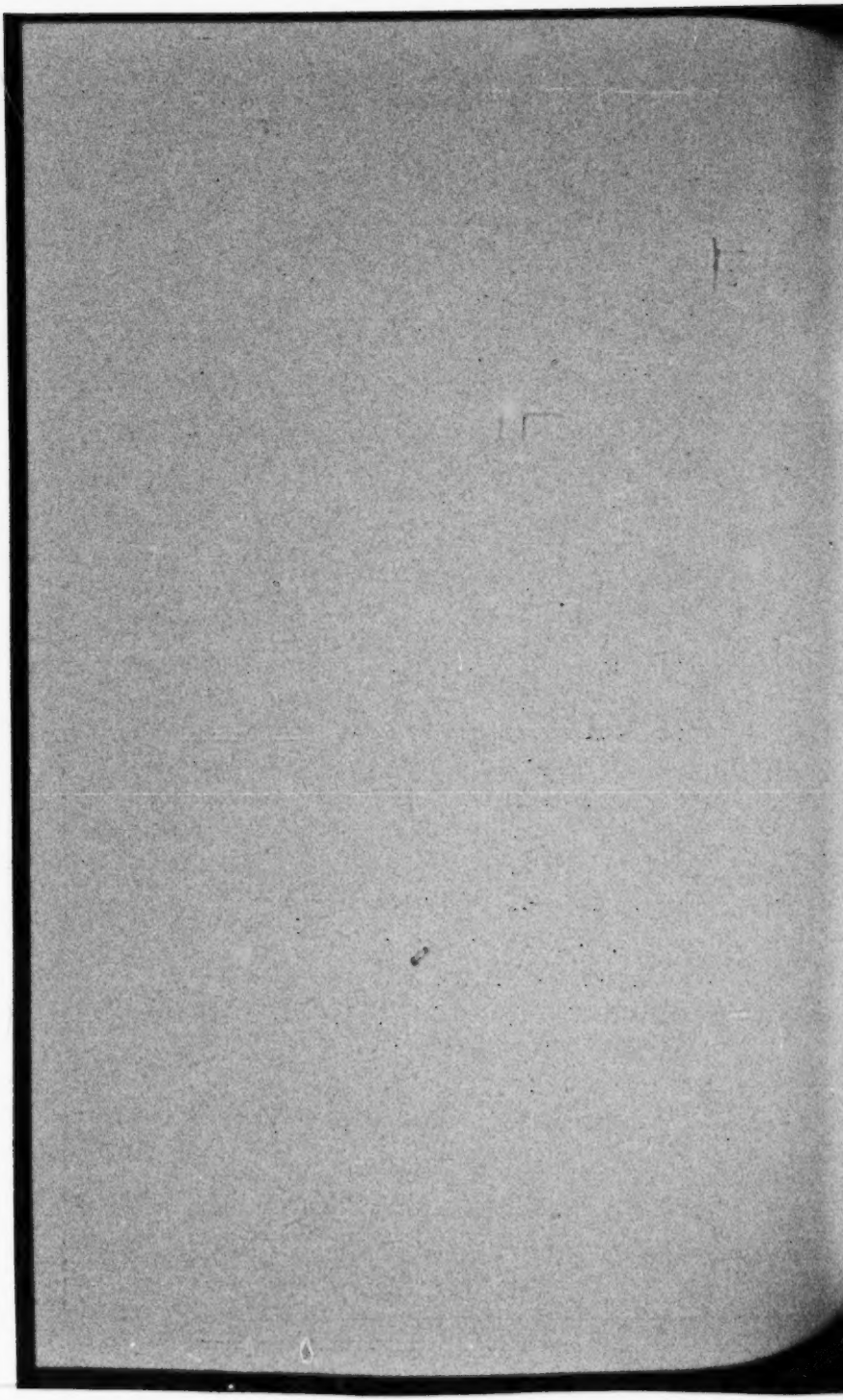

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. .....

ANGHEL GOLDSTEIN, aka Andrei Pietraru,
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JOHN T. CLANCY,
Surrogate of the County of Queens,
ARTHUR LEVITT,
State Comptroller,

Appellees.

On Appeal From the United States District Court
For the Southern District of New York.

JURISDICTIONAL STATEMENT.

Appellants appeal from the order and judgment of the United States District Court for the Southern District of New York, entered on December 20, 1968, denying the plaintiffs' motion for summary judgment, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW.

The opinion of the District Court is unreported and attached hereto as Appendix A.

JURISDICTION.

This suit was brought under 28 U. S. C. Section 2281, as a class suit pursuant to Rule 23(a) of the Federal Rules of Civil Procedure, to challenge the constitutionality and to enjoin the enforcement of Section 269-a, now Section 2218, New York Surrogate's Court Procedure Act. (See footnote pp. 11 and 12 of Opinion, Appendix A.) The judgment of the District Court was entered on December 20, 1968, and notice of appeal was filed in that court on February 13, 1969. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section, 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Toomer v. Witsell*, 334 U. S. 385; *St. John v. Wisconsin Employment Relations Board*, 340 U. S. 441; *Fergusan v. Skrupa*, 372 U. S. 726.

QUESTIONS PRESENTED.

1. Whether Section 2218 (formerly 269-a) of the Surrogate's Procedure Act of the State of New York is unconstitutional?

2. Whether the policy of the Federal government permitting the free flow of funds to Romania, based upon the agreement of March 30, 1960 with Romania, precludes New York from applying Section 2218 in order to withhold all or part of the funds belonging to a resident or national of Romania from a decedent's Estate or otherwise?

STATUTES INVOLVED.

Section 2218 (formerly 269-a) of the Surrogate's Procedure Act, of the State of New York (Appendix A, p. 11, footnote), Title 8, Section 511, C. F. R. (25 Fed. Reg. 3458, 3526); 31 CFR Section 211.3, set forth in Appendix B hereto.

STATEMENT OF CASE.

The complaint herein (Appendix C) challenges the constitutionality of the New York Surrogate's Procedure Act, Section 2218,[1] and the policy of the appellees predicated on the authority of such statute with regard to the rights of residents of Romania. As victims of such policy, whereby funds belonging to them have been and are being withheld from them by the appellees, the appellants sought to convene a special tribunal of three judges to pass on the constitutionality of the New York act and to enjoin its application. Both the District Judge and the Court of Appeals denied the request for a three judge court. On January 15, 1968, this Court, in this case, entered a per curiam order, 389 U. S. 581, and whereby it granted certiorari, summarily vacated the judgment of the Court of Appeals herein, and remanded the case to the Court of Appeals "for further consideration in the light of Zschernig v. Miller," 389 U. S. 429. On March 8, 1968, the Court of Appeals entered its order remanding Goldstein back to the District Court "for consideration of the constitutional issues by a three judge court pursuant to 28 U. S. C. Section 2281." In view of the decision in *Zschernig*, the appellants moved for summary judgment after issue was joined (Appendix D).

---

[1] At the time of the filing of the complaint herein, the statute was 269-a of the Surrogate's Court Act. It has been subsequently amended, and will be referred to herein as Section 2218.

Inexplicably, the motion for summary judgment came on for hearing on April 23, 1968, before one District Judge who did nothing at the time except indicate that he would take the matter under advisement. After some confusion (see appendices E and F), the motion for summary judgment was heard by a three judge court on June 24, 1968, and, on December 20, 1968, said court entered its order denying the motion for summary judgment.

THE QUESTIONS ARE SUBSTANTIAL.

1. The policy of New York, which is premised upon Section 2218 of the Surrogate's Court Procedure Act, is an unconstitutional interference with the exclusive power of the federal government to conduct the foreign affairs of this country, as held in Zschernig v. Miller, 389 U. S. 429.

The policy of the State of New York, which petitioners challenge as unconstitutional, is accurately set forth by the appellee Surrogate of King's County in his letter of October 15, 1965, in reply to a request addressed to him by an heir in Romania for the release and immediate payment of his distributive share in the modest amount of $2,989.63. The pertinent portion of said appellee's letter reads as follows:

> "I have given serious consideration to your letter of August 28, 1965, in which you request the release of your distributive share in the above estate. It is the public policy of the State of New York to withhold distribution to legatees who would not have the benefit or use or control of their bequest. The Appellate Courts of this State have held that residents of Rumania are within this description. As a Judge of the Surrogate's Court I am bound by the ruling of the higher court, and as an individual I am in full agreement with it. Accordingly, and despite my per-

sonal desire to help you because of your advanced age, physical infirmity and need for the money, I must advise you that if formal application for the payment of your bequest in full is made to me, I would be constrained to deny the same." (See p. 2, par. a, aff'd in Support of Motion for Summary Judgment.)

A recent and the latest affirmation of this policy regarding Romania is to be found in the Surrogate's decision in *In re Greenberg,* 46 Misc. 2d 883, 261 N.Y.S. 2d 176 (Surr. Ct. 1964), aff'd 24 App. Div. 2d 435 (1st Department, 1965), leave to appeal denied, 17 N.Y. 2d 417 (December 30, 1965).

It is difficult to comprehend the statement in the opinion of the lower court (p. 14) that "in the case before us there is no showing that New York courts have engaged in the conduct criticized in Zschernig," in the light of the facts set forth in paragraphs 3 (a) (b), 4, 5, 6, 7, and 8 of the affidavit in support of the motion for summary judgment (see appendix D). A few excerpts therefrom will readily reveal the fallacy of the court's conclusion. The appellee, Comptroller of the State, stated regularly as follows:

"* * * pursuant to a policy recommended by our Attorney General, we are not able to effect payments to residents of certain Eastern European Countries, including Romania because the situation exists which makes it doubtful as to whether the recipients of our checks would receive full value for the dollar amount."

"* * * The Department of Law however has advised us that it will continue its position as to payments to distributees domiciled in Rumania. A recent decision in the Surrogate's Court, New York County (Matter of Greenberg, New York Law Journal, June 16, 1964) upheld the position of the Attorney General of the State."

"* * * the policy of this Department is to withhold any such payments until and when the parties residing within such countries are outside of the jurisdiction of the Soviet Union."

"* * * this Department will not honor any claims from Rumanian nationals at the present time. March 4, 1963."

In addition, the court had before it various decrees of the New York Surrogates which provided for automatic withholding of funds belonging to Romanian distributees "pursuant to section 269-a of the Surrogate's Court Act (*Matter of Greenberg,* NYLJ, June 16, 1964, Cox, S.), aff'd App. Div. 1st. Dept. NYLJ." Since the decision in *Greenberg,* the funds belonging to a Romanian beneficiary have been and are ordered withheld instantly, on such authority, without according the beneficiary or his legal representative an opportunity to challenge the decree. It has been and still is the unalterable policy of Courts and authorities of New York to withhold funds of Romanian nationals for the sole reason that the beneficiary resides in Romania.

Interestingly enough, the lower court did not find the policy of New York, and, the application of its so-called "Iron Curtain" law, offensive to the Federal Constitution despite the findings and conclusions of the New York Courts in the case of *In re Greenberg* (pars. 4, 5, 6, affidavit in support of motion for summary judgment). In that case, both the Surrogate and the Appellate Court premised their conclusions upon the foreign exchange laws of Romania, which they erroneously considered confiscatory and unfair, and upon other internal conditions and circumstances in the country. This, however, was inconsequential to the lower court in its consideration of the foreign affairs aspect of the problem.

Following the decision of this Court in *Zschernig,*

undersigned counsel requested payment of the funds belonging to appellant, Iuliu Nasta, from the appellee-state comptroller, Arthur Levitt. In response thereto, said appellee stated (Appendix G):

> "Reference is made to your inquiry dated July 31, 1968. Please be advised that there has been no change in the policy of this Department not to transmit any funds to persons residing in Romania or to attorneys-in-fact for such persons. We have been advised that the Zschernig case referred to in your letter, does not apply to the situation involved herein and that the Goldstein case is now on appeal before the United States Court of Appeals for the Second Circuit. Our policy will continue in effect pending determination of the issues presented in the Goldstein case."

In other pending cases, Surrogates have upheld the constitutionality of Section 2218 upon the ground that *Zschernig* did not pass upon or decide the constitutionality of the New York statute, or that *Matter of Braier,* 305 N.Y. 148, appeal dism'd, sub nom., *Kalmane v. Green,* 346 U. S. 802 (1953), is still controlling despite *Zschernig, Matter of Zadlo* (Surrogate's Court, Westchester County #10473), *Matter of Harmoza* (Surrogate's Court, Nassau County), N.Y.L.J., May 27, 1968, p. 26, col. 1.

This present attitude on the part of New York is strange indeed, to say the least, in view of the representation of the Attorney General of New York to this Court in the case of *Ioannou v. New York,* No. 191, October Term, 1967.

We believe that the conclusions to be drawn from *Zschernig* indicate clearly that statutory restrictions such as contained in the New York law constitute an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and Congress. In this respect, the Court stated:

"* * * Yet, such forbidden state activity * * * has infected *each* of the three provisions of Section 11.070, as applied by Oregon." (Emphasis ours.)

Section 2218 of the New York statute, requiring a showing by the foreign heir that he will have the benefit, use or control of the funds due him, is identical with one of the three provisions of the Oregon act which was struck down by this Court as an impermissible interference with federal power over foreign affairs. This Court, in *Zschernig,* extended its opinion to the statutes and decisions of California, Montana, New York and Pennsylvania with a view, we believe, to making clear that "the rationale of that decision applies to custodial statutes such as New York has as well as to escheat statutes like Oregon's."

That the New York statute cannot be applied effectively without involving the courts in the kind of foreign relations activities proscribed by the Constitution, has been made equally clear by Mr. Justice Stewart, in his concurring opinion in *Zschernig,* in which he was joined by Mr. Justice Brennan, wherein he stated, as follows:

"I believe that all three of the statutory requirements on their face are contrary to the Constitution of the United States. In my view, *each* of the three provisions of the Oregon law suffers from the same fatal infirmity. *All three launch the State upon a prohibited voyage into a domain of exclusively federal competence.* Any realistic attempt to apply any of the three criteria would necessarily involve the Oregon courts in an evaluation, either expressed or implied, of the administration of foreign law, the credibility of foreign diplomatic statements, and the policies of foreign governments. Of course, state courts must routinely construe foreign law in the resolution of controversies properly before them, *but here the courts of Oregon are thrust into these inquiries only because the Oregon legislature has*

framed its inheritance laws to the prejudice of nations whose policies it disapproves and thus has trespassed upon an area where the Constitution contemplates that only the National Government shall operate." (Emphasis supplied.)

It is readily apparent from the foregoing declaration that the New York statute "suffers from the same fatal infirmity."

2. The policy of the State of New York, being challenged herein, is contrary to the policy of the Federal Government which permits the free flow of funds to Romania.

In the recent appeal to this Court from the decision of a three judge district court in Montana, *Gorun et al., v. Fall, et al.*, No. 496, Oct. Term, 1968, decided January 20, 1969, Mr. Justice Douglas, in an opinion concurred in by Mr. Justice Black, Mr. Justice Harlan, and Mr. Justice Fortas, declared relevant hereto, as follows:

"Federal Policy permits the free flow of funds to Romania. On March 30, 1960, we entered into an agreement with Romania, by which we agreed to release all blocked assets belonging to Romania. See 25 Fed. Reg. 3458. At the same time, Romania was removed from the list of countries to which the sending of public funds is prohibited. See 25 Fed. Reg. 3526; 31 CFR ss 211.2. *As our opinion in Zschernig makes clear, a state probate judge is not authorized to make or apply a probate rule contrary to that policy.*" (Emphasis supplied.)

That the action of the Federal Government in concluding the Financial Agreement of 1960 with Romania constitutes new foreign policy with relation to that country is clear. Agreements entered into by our government have the same force and effect and attain the same stature

as treaties in the formulation of foreign policy. In view of this agreement, the Secretary of the Treasury of the United States determined that residents and nationals of Romania would have the use, benefit or control of money transmitted to them from the United States. This determination by the Executive Department of the United States overrides any conflicting determination that the courts of New York may seek to make pursuant to the policy of the state as set forth in Section 2218. With regard hereto, this Court, in *Kolovrat v. Oregon*, 366 U. S. 187 (1961) declared

> "* * * state policies as to rights of aliens to inherit must give way under our Constitution's Supremacy Clause to 'overriding' federal treaties and conflicting arrangements."

For "state law must yield when it is inconsistent with, or impairs the policy or provisions of a treaty or *of an international compact or agreement.*" *United States v. Pink*, 315 U. S. 203, 231 (1942). (Italics ours.)

The Court also stated in *Pink*, page 233:

> "No state can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the State; it is vested in the national government exclusively * * *."

It is submitted, therefore, that the decision of the district court fails to conform to the rationale and decision of this Court in *Zschernig* and *Gorun v. Fall*, and that it authorizes the state courts to engage in activities prohibited by the Constitution of the United States. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

JOHN R. VINTILLA,
Counsel for Appellants.

APPENDIX A.

OPINION OF THE DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

McLEAN, *District Judge.*

The three plaintiffs in this action are nationals and residents of Rumania. They sue "on behalf of themselves and all other residents of Romania, similarly situated" for a judgment declaring that Section 2218 of the New York Surrogate's Court Procedure Act, formerly Section 269-a of the Surrogate's Court Act, is unconstitutional.*

---

* This statute now reads as follows:

"1. (a) Where it shall appear that an alien legatee, distributee or beneficiary is domiciled or resident within a country to which checks or warrants drawn against funds of the United States may not be transmitted by reason of any executive order, regulation or similar determination of the United States government or any department or agency thereof, the court shall direct that the money or property to which such alien would otherwise be entitled shall be paid into court for the benefit of said alien or the person or persons who thereafter may appear to be entitled thereto. The money or property so paid into court shall be paid out only upon order of the surrogate or pursuant to the order or judgment of a court of competent jurisdiction.

(b) Any assignment of a fund which is required to be deposited pursuant to the provisions of paragraph one (a) of this section shall not be effective to confer upon the assignee any greater right to the delivery of the fund than the assignor would otherwise enjoy.

2. Where it shall appear that a beneficiary would not have the benefit or use or control of the money or other property due him or where other special circumstances make it desirable that such payment should be withheld the decree may direct that such money or property be paid into court for the benefit of the beneficiary or the person or persons who may thereafter appear entitled thereto. The money or property so paid into court shall be paid out only upon order of the court or pursuant to the order or judgment of a court of competent jurisdiction.

3. In any such proceeding where it is uncertain that an alien beneficiary or fiduciary not residing within the United States, the District of Columbia, the Commonwealth of Puerto Rico or a territory or possession of the United States

(Continued on following page)

They also seek an injunction restraining five New York Surrogates and the Comptroller of the State of New York from enforcing and applying it.

The prior history of this action may be briefly stated. In the spring of 1967 plaintiffs moved for an order convening a three-judge court pursuant to 28 U.S.C. § 2281. They also moved for an injunction pendente lite. The district court denied the preliminary injunction. It also denied the request for a three-judge court on the ground that, although a substantial federal question was raised, this question was one of federal "supremacy" which, under *Swift & Co. v. Wickham*, 382 U. S. 111 (1965), was to be decided by one judge, not by three.

Goldstein v. Cox, 66 Civ. 4487 (S.D.N.Y. April 4, 1967).

On September 27, 1967, the Court of Appeals, from the bench, affirmed the order of the district court. The Supreme Court, however, vacated the order of the Court of Appeals and remanded the case to the Court of Appeals "for further consideration in light of *Zschernig v. Miller*." (389 U.S. 429 (1968).)

Goldstein v. Cox, 389 U.S. 581 (1968).

The Court of Appeals thereupon reversed the order of the district court and remanded the case for consideration of the constitutional issues by a three-judge court.

Goldstein v. Cox, 391 F.2d 586 (2d Cir. 1968).

(Continued from preceding page)

would have the benefit or use or control of the money or property due him the burden of proving that the alien beneficiary will receive the benefit or use or control of the money or property due him shall be upon him or the person claiming from, through or under him."

Section 1 was added by Ch. 998 of the Laws of 1968 which became effective on June 22, 1968, after the motion now under consideration was made.

Plaintiffs then moved for summary judgment. That is the motion which we are now called upon to decide.

The motion is supported only by an affidavit of plaintiff's attorney which is devoted primarily to a discussion of the law. It contains few facts. As to plaintiff Goldstein, it says only:

> "The Surrogate, in the judicial settlement in the Estate of Maurice Siegel, wherein the rights of plaintiff, Anghel Goldstein are involved, decreed:
>
> > 'Ordered, Adjudged and Decreed that the distributive share to which the said Angel Goldstein is entitled be paid into this Court by depositing the sum of $2,230.40 wth the Treasurer of the City of New York to the credit of this proceeding, and the Treasurer of the City of New York hereby is directed to deposit said sum of $2,230.40 in any savings bank located in the County of Bronx for the benefit of said Angel Goldstein and subject to the further order of this court, and it is further.' "

The affidavit contains a similar statement as to plaintiff Fundi, reading as follows:

> "The defendant, Surrogate Samuel DiFalco, in the estate of Jerotheos Stavrou, in which plaintiff, George Fundi is a distributee, in settling said estate, ordered (NYLJ, 8/3/65), pertinent hereto, as follows:
>
> > 'Any sum payable to legatees or distributees in Rumania will be deposited in court pursuant to section 269-a of the Surrogate's Court Act (Matter of Greenberg, NYLJ, June 16, 1964 (Cox, S.), aff'd App. Div. 1st Dept. NYLJ.' "

The text of the affidavit does not refer to plaintiff Nasta. Annexed to the affidavit, however, are copies of letters from the office of the New York Comptroller dated respectively February 28, 1962 and November 16, 1964, the first of which is addressed to Juliu Nasta in Bucharest,

Rumania, and the second to plaintiffs' attorney. Each letter is captioned:

"NASTA, JULIU
Atty-in-Fact for
Opreana Comanicu
J. P. Morgan & Co.
Acct. BD#47801
Abandoned Property"

There is no explanation of what the "abandoned property" is, how it came to be abandoned, or whether it has any connection with the statute here under consideration. In each letter the Comptroller's Office stated in substance that pursuant to a policy recommended by the New York Attorney General, the Comptroller was not in a position to make payment of residents of Rumania.

The only other factual material submitted in support of this motion consists of a copy of a letter dated October 15, 1965 from the then Surrogate of Kings County to Isac Silianu (not a plaintiff) in Bucharest, Rumania, and copies of five letters from the office of the New York Comptroller bearing various dates in 1962, 1963 and 1966, one of which is addressed to Borbala Barbieri (not a plaintiff) in Bucharest, Rumania, and the others to the same attorney who represents the plaintiffs in this action.

The Surrogate's letter stated in substance that if Isac Silianu were to make formal application for the payment of his bequest in full, the Surrogate would be constrained to deny it, but that the Surrogate would give "sympathetic consideration to a request for transmittal to you in periodic installments of small sums for purchase of food and clothing parcels, if a demonstration can be made of the feasibility thereof."

The Comptroller's letters were each headed "Abandoned Property." Two of them indicate that the

property consists of an account in J. P. Morgan & Co. The other three refer to "Prunder, Denette, Estate of." In each letter the Comptroller's office in substance declined to pay a claim of a resident of Rumania or of individuals within the jurisdiction of the Soviet Union.

The motion is opposed by an affidavit of an Assistant Attorney General of New York. That affidavit is entirely argumentative. It can fairly be said to contain no facts at all.

On this record we are asked to hold as a matter of law that Section 2218 is unconstitutional because it interferes with the exclusive prerogative of the federal government to conduct the foreign affairs of the United States. Plaintiffs claim that this result is required by the Supreme Court's decision in *Zschernig*.

The validity of the statute, as it read at the time, was twice upheld by the New York Court of Appeals prior to *Zschernig*.

> *Matter of Braier*, 305 N.Y. 148 (1953), *appeal dismissed sub nom. Kalmane v. Green*, 346 U.S. 802 (1953);
>
> *Matter of Marek*, 11 N.Y.2d 740 (1962), *appeal dismissed sub nom. Ioannou v. New York*, 371 U.S. 30 (1962).

In each case the Supreme Court dismissed the appeal from the New York Court of Appeals' decision for want of a substantial federal question. As far as appears from the Court of Appeals' opinion in *Braier* and from the memorandum in *Marek* (in which no opinion was written), the ground upon which the constitutionality of the statute is challenged in the present action was not raised or decided in either case.

Recently the unsuccessful claimant in *Marek* (Ioannou) moved in the Supreme Court for leave to file a peti-

tion for rehearing. The Supreme Court denied the motion "upon the representation of the Attorney General of New York that the movant may file a new application 'to withdraw the funds deposited with the New York City Treasurer' in the light of changed circumstances. See *Zschernig v. Miller*, 389 U.S. 429; *Goldstein v. Cox*, 389 U.S. 581."

Ioannou v. New York, 391 U.S. 604 (1968).

In *Zschernig*, the Supreme Court had before it an Oregon statute which provided in substance that property of an Oregon decedent which would otherwise pass by succession or testamentary disposition to a nonresident alien would, in the absence of other eligible heirs, devisees or legatees, escheat to the state of Oregon unless the alien proved (1) the existence of a reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the foreign country; (2) the right of United States citizens to receive payment here of funds from estates in the foreign country; and (3) the right of the alien to receive the benefit, use or control of the proceeds of Oregon estates, "without confiscation" by the government of his country. The Court held this statute unconstitutional because it impaired "the effective exercise of the Nation's foreign policy." 389 U.S. at 440.

Subsequent to this decision, the New York Court of Appeals again considered the constitutionality of Section 2218 and, despite *Zschernig*, declined to hold the statute unconstitutional on the record before it.

Matter of Leikind, 22 N.Y.2d 346 (1968).

We are called upon to decide whether, on the record now before us, we are impelled to a conclusion similar to, or different from, the conclusion which the New York Court of Appeals reached in *Leikind*.

The decision depends upon the reasons given by the Supreme Court in *Zschernig* for invalidating the Oregon statute. Before considering those reasons, however, mention must be made of an earlier Supreme Court decision, *Clark v. Allen,* 331 U.S. 503 (1947).

In *Clark,* the Court passed upon a California statute which contained reciprocal provisions substantially identical with the first two requirements in the Oregon statute, but which did not contain the benefit, use and control requirement. The Court upheld the constitutionality of the California statute as against a claim that it constituted an interference by the state of California in the field of foreign affairs.

In *Zschernig,* the Supreme Court expressly declined to overrule *Clark v. Allen.* Instead, it distinguished it, saying:

> "We were there concerned with the words of a statute on its face, not the manner of its application." 389 U.S. at 433.

The Court went on to point out that state courts frequently construe and apply the laws of foreign nations and that:

> "It has never been seriously suggested that state courts are precluded from performing that function, albeit there is a remote possibility that any holding may disturb a foreign nation * * *." 389 U.S. at 433.

But the Court said:

> "It now appears that in this reciprocity area under inheritance statutes, the probate courts of various States have launched inquiries into the type of governments that obtain in a particular foreign nation * * *." 389 U.S. at 433-34.

The Court pointed out that the Oregon statute added to the requirement of reciprocity a new concept of confiscation and that this had "led into minute inquiries concerning the actual administration of foreign law * * *." 389 U.S. at 435. The Court documented this statement by quoting intemperate remarks contained in opinions of state court judges, such as, "Russia kicks the United States in the teeth all the time," and the like. 389 U.S. n. 8 at 437. The Court said that the Oregon statute "as construed seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own." 389 U.S. at 440.

The Court concluded that:

> "It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way." 389 U.S. at 440.

On this basis the Court held the Oregon statute unconstitional.

Two justices concurring in a separate opinion stated that, while joining the opinion of the Court, they would go further and hold the Oregon statute unconstitutional on its face. Obviously, it was manifest to these two justices, as it is to us, that the opinion of the Court did not go this far, but held only that the Oregon statute was unconstitutional because of the manner of its application.

In *Leikind*, the New York Court of Appeals read the opinion of the Court in *Zschernig* as a decision dealing with the application of the statute by the Oregon courts. The Court of Appeals held that in the case before it there was no showing that "the lower courts in this case have currently engaged in the conduct criticized, and additionally illustrated in the footnotes of the *Zschernig* case, as interference with foreign relations." Consequently,

said the court, "there is no present warrant to reconsider the earlier rulings of this court sustaining the constitutionality of the statutes which preceded the present one [*i.e., Braier* and *Marek, supra*]." 22 N.Y.2d at 352.

The Court of Appeals recognized the possibility that the Supreme Court might extend the *Zschernig* rule in the future. Thus, it said that in *Zschernig*, the Supreme Court "arguably accepted 'benefit, use or control' provisions as valid, provided State courts did no more than 'routinely read' foreign laws and provided there was no palpable interference with foreign relations in their application." 22 N.Y.2d at 351-52. But the court conceded that "the sweep of the opinion might suggest to some that in a later case the court might hold that in reality no such statute could ever be restricted to a 'routine reading.' " 22 N.Y.2d n. 2 at 352.

In the case before us there is no showing that the New York courts have engaged in the conduct criticized in *Zschernig*. There is no showing and not even any claim that the New York courts have uttered any animadversions concerning Rumania. All we are told is that two New York Surrogates have directed that the distributive shares of plaintiffs Goldstein and Fundi in New York estates be deposited in court, pursuant to the statute, and that the office of the New York Comptroller has declined to turn over certain "abandoned properties" to persons resident in Rumania or in territories within the jurisdiction of the Soviet Union. We are not informed as to what investigation, if any, preceded these judicial and administrative decisions.

We conclude that this record is inadequate to justify this court in holding, summarily, that Section 2218 is unconstitutional under the *Zschernig* rule. Without any evidence whatever as to how Section 2218 has been applied in

this case, we are unable to say that it has been applied in such a way as to interfere with the foreign relations of the United States. We interpret the Supreme Court's recent ruling denying a rehearing in *Ioannou* as at least an indication that evidence of improper application of the statute is necessary.

We appreciate that the Supreme Court may eventually go further than it has thus far gone and that it may eventually hold that all benefit, use and control statutes are invalid regardless of how the state courts have applied them. But we conceive it to be our duty to enforce the law as it is, not as it may be in the future.

Accordingly, the motion for summary judgment is denied.

So ordered.

IRVING R. KAUFMAN,
U. S. C. J.

EDWARD C. MCLEAN,
U. S. D. J.

CHARLES TENNEY,
U. S. D. J.

Dated: December 18, 1968

APPENDIX B.

TITLE 31—MONEY AND FINANCE: TREASURY.

Chapter II—Fiscal Service, Department of the Treasury—Subchapter A—Bureau of Accounts.

Part 211—Delivery of Checks and Warrants to Addresses Outside the United States, Its Territories and Possessions.

Withholding of Delivery on Checks and Warrants.

Part 211, Subchapter A, Chapter II, Title 31, of the Code of Federal Regulations of the United States of America (appearing also as Treasury Department Circular No. 655 dated March 19, 1941, is supplemented) is hereby amended by revising § 211.3 (a) and (b) to read as follows:

§ 211.3 Withholding of delivery on checks and warants.

(a) The Secretary of the Treasury hereby determines that postal, transportation, or banking facilities in general or local conditions in Albania, Bulgaria, Communist-controlled China, Czechoslovakia, Estonia, Hungary, Latvia, Lithuania, the Union of Soviet Socialist Republics, the Russian Zone of Occupation of Germany, and the Russian Sector of Occupation of Berlin, Germany, are such that there is not a reasonable assurance that a payee in those areas will actually receive checks or warrants drawn against funds of the United States, or agencies or instrumentalities thereof, and be able to negotiate the same for full value.

TITLE 8—ALIENS AND NATIONALITY.

Chapter II—Office of Alien Property, Department of Justice—Part 511—Blocked Asse s.

General License.

Article VI of the Agreement between the United States of America and the Rumanian People's Republic Relating to Financial Questions Between the Two Countries, done at Washington, D. C., on March 30, 1960, provides that the United States will release its blocking controls over all Rumanian property in the United States. The following amendment of General License No. 101 effects such unblocking by deleting references to Rumania and persons within Rumania from subparagraphs (1) and (2) of § 511.101(a). This amendment relieves existing restrictions and does not impose any new requirements on the public and it is hereby found that notice, hearing and suspension of applicability are unnecessary.

APPENDIX C.

COMPLAINT.

Plaintiffs, complaining of the defendants, allege:

1. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1331, and also under Title 28, United States Code, Section 2281, being a suit in equity to challenge the constitutionality of Section 269-a of the New York Surrogate's Court Act and the policy predicated on the authority of such statute, and to enjoin the enforcement of the statute on the ground that it violates the rights secured to the plaintiff and others similarly situated under the Constitution of the United States,

and that the Statute infringes upon the exclusive power of the Federal Government over foreign affairs, as hereinafter more fully appears.

2. The Surrogate's Court Act, Section 269-a, provides as follows:

> "Where it shall appear that a legatee, distributee or beneficiary of a trust would not have the benefit or use or control of the money or other property due him, or where other special circumstances make it appear desirable that such payment should be withheld the decree may direct that such money or other property be paid into the surrogate's court for the benefit of such legatee, distributee, beneficiary of a trust, or such person or persons who may thereafter appear to be entitled thereto. Such money or other property so paid into court shall be paid out only by the special order of the surrogate or pursuant to the judgment of a court of competent jurisdiction."
>
> Surrogate's Court Act, Section 269-a(1).

3. Plaintiffs are nationals of Romania, and are residents and domiciled in said state. They bring this action on behalf of themselves and all other residents of Romania, similarly situated with respect to the matters here involved. They are so numerous as to make it impracticable to bring them all before the Court. There being identical or same questions of law and fact, a common relief being sought as will hereinafter more fully appear, plaintiffs brings this action as a class suit, pursuant to Rule 23(a) of the Federal Rules of Civil Procedure:

4. The defendants, Joseph A. Cox, S. Samuel DiFalco, Edward S. Silver, Christopher C. McGrath, John T. Clancy are the duly elected, qualified and acting judges of the Surrogate's Courts of New York, Kings, Bronx and Queens Counties, respectively.

5. The defendant, Arthur Levitt, is the duly appointed, qualified and acting Comptroller of the State of New York, and that as such officer he has in his possession and/or under his control, funds belonging to plaintiff, Iuliu Nasta, and other residents of Romania. That he has refused and continues to refuse to honor the claim of and to pay the funds belonging to the plaintiff, Iuliu Nasta, and continues to refuse to honor the claim of any Romanian national, on the basis of the existing policy of the state of New York not to effect payments to residents of certain Eastern European Countries including Romania, and that he refuses to make any payments until such time as those who are entitled to said payment are without the jurisdiction of Romania.

6. That the Surrogates of Bronx and New York counties have ordered the withholding of distribution to the plaintiffs, Anghel Goldstein and Gheorghe Fundi, distributees of the estate of Maurice Siegel, File No. 687 A—1950, and Jerotheos Stavrou, File No. P. 3152—1963, without notice or any opportunity to be heard, and solely because of the existing policy of the State of New York prohibiting the transfer of the funds to residents of Romania. It is the practice of these Surrogate-defendants in the settlement of the final account of an executor or administrator, to withhold the sum payable to a legatee or distributee in Romania and to order it deposited in court pursuant to Section 269-a of the Surrogate's Court Act.

7. The public policy of the State of New York governing the payment of the distributive shares of residents in Romania in decedent's estates, is predicated upon Section 269-a of the Surrogate's Court Act, and has been sustained by the Court of Appeals of New York in the Matter of Greenberg, motion for leave to appeal denied,

December 30, 1965, 17 N. Y. 2d, 417, 46 Misc. 2d, 383, 24 App. Div. Rep. 2d, 435.

8. On February 19, 1951, the United States Treasury Department, pursuant to the authority vested in it by P. L. No. 828, Section 5, 54 Stat. 1036, 31 U. S. C. A., Section 123, issued Treasury Circular 655, listing twelve countries, including Romania, to which the forwarding of public funds, such as social security benefits and veteran's pensions, was prohibited. The Treasury Department concluded, therefore, that with respect to checks or warrants drawn against funds of the United States in favor of a Romanian national, local conditions in Romania were such that there was not a reasonable assurance that a payee in that country would actually receive payment or be able to negotiate the check or warrant for full value, Title 31, Section 211.3(a).

9. On March 30, 1960, an agreement relating to financial questions was concluded at Washington, D. C. between the governments of the United States and of Romania. By virtue thereof, Romania was removed from the proscribed list of the United States Treasury Department of countries to which federal funds may not be transmitted, and, furthermore, all federal regulations of a blocking nature regarding Romanian nationals were removed, 31 C. F. R. Section 211.2 (a), 25 Federal Regulations, pages 3456, 3526. The present official policy of the United States regarding payment of funds to persons resident in Romania, is set forth in the United States Treasury Regulation 655, as amended in April 1960, and now declares that there is a reasonable assurance that a payee in that area will actually receive checks or warrants drawn against funds of the United States, and will be able to negotiate them for full value. That ever since April of

1960, the United States has been remitted checks and warrants representing social security benefits, veterans pensions and other public funds to residents in Romania without any problem or difficulty as to the receipt, and use and control thereof by the recipient.

10. The policy of the State of New York, as applied to the residents of Romania, as hereinabove set forth, encroaches upon and impairs the effective exercise of the power to conduct foreign relations which is constitutionally vested in the Federal Government to the exclusion of the State of New York.

11. The authoritative conclusion by The Treasury Department of the United States that a reasonable assurance exists that a payee in Romania will actually receive the funds remitted to him and will be able to negotiate checks or warrants for full value, and the consequent transfer of public funds to residents in Romania since April of 1960, constitutes official Federal policy, and therefore, the policy of the State of New York in withholding distribution to heirs, legatees or beneficiaries in Romania is in direct conflict with and in violation of, and must give way to overriding federal policy.

12. That Section 269-a of the Surrogate's Court Act of New York, as applied by these defendants to the rights of these plaintiffs and other residents of Romania, deprives them arbitrarily of their distributive shares, and constitutes an unconstitutional governmental interference without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

13. Defendants have established and are maintaining a policy and practice of denying residents of Romania their distributive shares, otherwise secured to them, solely, be-

cause of their place of residence, and that such practice unlawfully discriminates against the plaintiffs and others similarly situated of the equal protection of the laws guaranteed them by the Fourteenth Amendment insofar as the statute is applied only because of their place of residence.

14. That the defendants Surrogates and others have been withholding the distributive shares belonging to residents of Romania, pursuant to the aforementioned public policy of New York, for more than fifteen years, and the amount being withheld is in excess of one half million dollars.

15. Many of the plaintiffs and others similarly situated are in dire need and/or aged and desperately in need of these funds. A delay in ascertaining and determining the rights of the plaintiffs, and others similarly situated and affected, on whose behalf this suit is brought, will result in further denial and deprivation of their rights in the indefinite future by reason of the acts herein complained of. There is no other remedy afforded by law or statute against the illegal acts and conduct of the defendants, save the equity powers of this Court, and unless the relief prayed for is granted.

WHEREFORE, plaintiffs pray that a three judge court be convened, pursuant to Title 28 U. S. C., Section 2281, and for the following relief:

1. That this Court enter a judgment or decree declaring that the policy and practice of the defendants in denying these plaintiffs and others similarly situated the right to their distributive shares from decedent's estates and to other funds to which they are entitled on account of their residence in Romania is a denial of the rights secured to them by the Fifth and Fourteenth Amendments to the

United States Constitution and, therefore, unconstitutional and void.

2. That Section 269-a of the Surrogate's Act of New York, as applied by the defendants to the rights of these plaintiffs and others similarly affected, be declared unconstitutional.

3. That this Court issue a permanent injunction forever restraining and enjoining the defendants and each of them, their agents and employees, from denying plaintiffs, and others similarly situated the right to their distributive shares from decedents' estates, and to other funds to which they may be entitled; that the defendants, and each of them, their agents, and employees, be ordered and directed to take such action as shall be necessary to deliver the distributive shares and other funds which are due and owing to and being withheld from these plaintiffs and others similarly situated.

4. That pending the final hearing and determination of this complaint upon its merits, the Court issue a preliminary injunction, restraining the defendants and each of them, their agents, and employees, from denying the plaintiffs, and others similarly situated, the right to their distributive shares and other funds to which they may be entitled.

5. For such other and further relief which this Court may deem proper.

APPENDIX D.

MOTION FOR SUMMARY JUDGMENT WITH AFFIDAVIT.

Plaintiffs move the court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiffs' favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law; and, especially, in the light of *Zschernig v. Miller*, 36 L. W. 4120 (1/15/68), decided by the Supreme Court of the United States.

The Affidavit of John R. Vintilla is attached hereto in support of this motion.

JOHN R. VINTILLA,
EMANUEL ESCHWEGE,
NOVAK N. MARKU,
Attorneys for Plaintiffs.

AFFIDAVIT OF JOHN R. VINTILLA.

STATE OF OHIO,
COUNTY OF CUYAHOGA, SS.

John R. Vintilla, being duly sworn, says:

1. He is one of the attorneys for the plaintiffs herein.

2. That he has handled and appeared in similar matters wherein the rights of romanian nationals were involved throughout the United States.

3. The policy of the State of New York, which plaintiffs challenge as unconstitutional, is accurately set forth by the following:

a.) Defendant, Edward Silver, Surrogate of King's County, in his reply of October 15, 1965 (Appendix III annexed hereto) to a request addressed to him by an heir

in Romania for the release and immediate payment of his distributive share in the modest amount of $2,989.63 (R. Reply Affidavit of John R. Vintilla), wrote, pertinent hereto, as follows:

> "I have given serious consideration to your letter of August 28, 1965, in which you request the release of your distributive share in the above estate. It is the public policy of the State of New York to withhold distribution to legatees who would not have the benefit or use or control of their bequest. The Appellate Courts of this State have held that residents of Rumania are within this description. As a Judge of the Surrogate's Court, I am bound by the ruling of the higher court, and as an individual I am in full agreement with it. Accordingly, and despite my personal desire to help you because of your advanced age, physical infirmity and need for the money, I must advise you that if formal application for the payment of your bequest in full is made to me, I would be constrained to deny the same."

b.) Defendant, Arthur Levitt, wrote, relevant hereto, to several romanian claimants and affiant in connection with the release and payment of funds being withheld by his office, the following:

> "Upon the basis of the documentation you have submitted we have conferred with our Legal Division and as a result we are of the opinion that you have established yourself as the owner of the funds involved. We regret to say however, that at the present time pursuant to a policy recommended by our Attorney General, we are not able to effect payments to residents of certain Eastern European Countries including Roumania because the situation exists which makes it doubtful as to whether the recipients of our checks would receive full value for the dollar amount thereof." (28 February, 1962, Appendix I.)

"We have given your letter careful consideration together with the documentation forwarded therewith. We are advised that the Department of Law is aware of the removal of Romania from the list of countries contained in Treasury Circular 655. The Department of Law however has advised us that it will continue its position as to payments to distributees domiciled in Romania. A recent decision in the Surrogate's Court, New York County (Matter of Greenberg, New York Law Journal, June 16, 1964) upheld the position of the Attorney General of this State. Presumably this case will be appealed but until a reversal is had we must hold to the position taken in our letter to your client of February 28, 1962." (16 November, 1964, Appendix II.)

"* * *, we are not approving any claims payable to residents of Roumania who are within the jurisdiction of the Soviet Government." (June 6, 1962, Appendix IV.)

"* * *, our position in allowing refunds, on claims held by residents of Roumania has not changed and any action that you take at this time to obtain such a refund would be entirely at your own risk and also that of the claimants as we would not make any payments until such time as those who are entitled to said payments are without the jurisdiction of Roumania." (June 15, 1966, Appendix V.)

"We regret to inform you, however, that inasmuch as you represent a Rumanian National who claims to be entitled to the above estate, payment of the above captioned item may not in any event be made to him under existing policy and regulations until such time as it is believed such Rumanian Nationals will be enabled to have the full use or benefit of such funds as may be transmitted to them." (June 13, 1962, Appendix VI.)

"Please be advised that notwithstanding any present Federal regulations in reference to the trans-

mission of money to private individuals residing in countries within the jurisdiction of the Soviet Union, the policy of this Department is to withhold any such payments until and when the parties residing within such countries are outside of the jurisdiction of the Soviet Union." (July 6, 1962, Appendix VII.)

"We regret to advise, notwithstanding the numerous citations set forth in your letter, that this department will not honor any claims from Rumanian nationals as of the present time." (March 4, 1963, Appendix VIII.)

4. The most recent pronouncement of the New York courts with regard to the rights of nationals and residents of Romania to receive the proceeds from New York estates or other funds due them is the case of *In Re Greenberg*, 46 Misc. 883, 261 N.Y.S. 2d 176 (Surr. Ct. 1964), aff'd 24 App. Div. 2d 435 (1st Department, 1965) leave to appeal denied, 17 N.Y. 2d 417 (December 30, 1965); Defendant Joseph A. Cox, Surrogate of New York County, refused payment to the legatee in Romania in *Greenberg*, and, among the reasons for his action, stated in his opinion:

"The burden of establishing that the Rumanian national would have the benefit or use or control of the money or other property due him was upon the attorneys in fact (Surrogate's Ct. Act, ss. 269-a). The evidence offered to meet this burden consisted primarily of testimony of an officer of the Rumanian Legation in Washington who stated that by reason of his employment for four years as a lawyer he had become an expert in the estate law of Rumania. This witness testified that a Rumanian resident receives his inheritance in Rumanian currency at the rate of 12 lei for each dollar, which is twice the government controlled rate of exchange for commercial transactions. This witness also testified as to the free use

of such money within Rumania although it could not be transmitted outside of that country. The testimony was that a Rumanian must notify the State Bank of any inheritance and must act through an attorney in fact in the collection of the money.

It must be recognized that, whether or not Rumania imposes restrictions within the meaning of section 269-a, it is an iron curtain country under Soviet dominance and, for such reason, facts either as to the operation of Rumanian laws or that country's monetary practices are not available to an inquirer who might be regarded as influenced by capitalist doctrines. It would appear that this was the unfortunate position in which the Attorney General found himself. The Attorney General was able to offer evidence of certain restrictive provisions of Rumanian law governing the ownership and use of property generally and these restrictions are well recognized as consistent with the Communist program of subordinating individual freedom for the material advancement of the Communist state. However, these restrictions do not seem to be peculiar to beneficiaries of foreign inheritances. While the attorneys in fact for the Rumanian national make much of the preferential exchange rate purportedly applicable to foreign inheritances, this argument is premised upon the assumption that an exchange rate of double that available in certain commercial transactions within Rumania is necessarily fair. This assumption can only be as sound as its premise, which is that the normal rate of exchange embodies a modicum of fairness. Casting grave doubt upon the usefulness of this formula is the established fact that Rumanian lei are procurable in this country at a rate of 31¾ lei to the dollar. Upon this basis the rate of exchange applicable to foreign legacies must be regarded as confiscatory and it cannot be validly contended that a Rumanian who would forfeit such a large portion of his legacy is receiving the benefit or use of $150,000."

5. The appellate court, in affirming the order of Surrogate Cox in *Greenberg*, declared:

> "* * * The substantial differential between the Romanian internal rate of exchange applicable to estate distributions received from foreign countries and the external rate of exchange establishes that the distributee 'would not have the benefit or use or control of the money or other property due him,' as required by section 269-a of the Surrogate's Court Act. With respect to the other circumstances in Romania affecting the distributee's interest in view of the large sum of money involved ($120,797.69), and the distributee's failure to make a personal appearance to testify in support of his own claim, there is grave doubt additionally, that he will have the benefit, use or control of the money or property."

6. The defendant, Surrogate Samuel DiFalco, in the estate of Jerotheos Stavrou, in which plaintiff, George Fundi is a distributee, in settling said estate, ordered (NYLJ, 8/3/65), pertinent hereto, as follows:

> "Any sum payable to legatees or distributees in Rumania will be deposited in court pursuant to section 269-a of the Surrogate's Court Act (Matter of Greenberg, NYLJ, June 16, 1964 (Cox, S.), aff'd App. Div. 1st Dept, NYLJ)."

7. The defendant, Surrogate Silver, in construing the will in the *Matter of the Estate of Mary Moroson* entered the following order (N. Y. L. J. 5/12/65):

> "The shares of the distributees, who are Romanian Nationals, will be deposited with the director of finance of the City of New York pursuant to section 269-a of the surrogate's court act (Matter of Greenberg, NYLJ June 16, 1964, p. 14, cols. 3-4 (Cox, S)). Settle decree."

8. The Surrogate, in the judicial settlement in the *Estate of Maurice Siegel,* wherein the rights of plaintiff, Anghel Goldstein are involved, decreed:

> "Ordered, Adjudged and Decreed that the distributive share to which the said Angel Goldstein is entitled be paid into this Court by depositing the sum of $2,230.40 with the Treasurer of the City of New York to the credit of this proceeding, and the Treasurer of the City of New York hereby is directed to deposit said sum of $2,230.40 in any savings bank located in the County of Bronx for the benefit of said Angel Goldstein and subject to the further order of this court, and it is further"

10. According to the decision of the Supreme Court of the United States in *Zschernig,* the history and operation of the New York statute, as hereinabove shown, "make clear that (Section 269-a) is an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." Mr. Justice Douglas, in the majority opinion of the Court in the *Zschernig* case stated, "as one reads the Oregon decisions, it seems clear that foreign policy attitudes, the freezing or thawing of the 'cold war,' and the like are the real desiderata." And, as a footnote to this statement, the opinion of the Court recites: "Such attitudes are not confined to the Oregon courts. Representative samples from other States would include statements in the New York courts, * * *." In commenting upon such statements and attitudes of the state courts in their application of the "Iron-Curtain" statute, Mr. Justice Douglas further declared: "* * * Yet they, of course are matters for the Federal Government, not for local probate courts."

11. Mr. Justice Stewart, in a concurring opinion joined by Mr. Justice Brennan, in *Zschernig,* reviewed the

provisions of the Oregon "iron-curtain" statute, one of which is similar substantially with the statute hereunder attack ("benefit, use and control"), and commented, as follows: "I believe that all three of the statutory requirements on their face are contrary to the Constitution of the United States. In my view, *each* of the three provisions of the Oregon law suffers from the same fatal infirmity. *All three launch the State upon a prohibited voyage into a domain of exclusively federal competence.* Any realistic attempt to apply any of the three criteria would necessarily involve the Oregon courts in an evaluation, either expressed or implied, of the administration of foreign law, the credibility of foreign diplomatic statements, and the policies of foreign governments. Of course state courts must routinely construe foreign law in the resolution of controversies properly before them, *but here the courts of Oregon are thrust into these inquiries only because the Oregon legislature has framed its inheritance laws to the prejudice of nations whose policies it disapproves and thus has trespassed upon an area where the Constitution contemplates that only the National Government shall operate.*" (Emphasis supplied.) A substitution of New York in the place of Oregon in the foregoing declaration readily reveals that New York statute "suffers from the same fatal infirmity."

WHEREFORE, Deponent submits that the Surrogate's Court Act, Section 269-a, is invalid and unconstitutional, and respectfully requests that the relief prayed for in the complaint herein be granted.

JOHN R. VINTILLA.

(Jurat omitted.)

APPENDIX E.

20 May 1968

Chief Judge of the
U. S. District Court
Southern District of New York
United States Court House
Foley Square
New York, New York, 10007

RE.: Goldstein et al v. Cox et al

Dear Sir:

I am taking the liberty of writing to you in view of the apparent confusion of the disposition of plaintiffs' motion for summary judgment in the light of the mandate of the Supreme Court of the United States in this case, and the remand order of the United States Court of Appeals for the Second Circuit to this court of March 8, 1968.

Inasmuch as we deem the mandate of the Supreme Court of the United States and the remand order of the Court of Appeals self executing, as chief counsel for the plaintiffs in the above entitled cause, I would sincerely appreciate a communication from your court about the disposition of plaintiffs motion for summary judgment heretofore filed in your court.

Respectfully yours,

JOHN R. VINTILLA,
Chief Counsel for Plaintiffs.

APPENDIX F.

UNITED STATES DISTRICT COURT
New York, N. Y. 10007

May 24, 1968

John R. Vintilla, Esq.
550 Hanna Buildir.g
Cleveland, Ohio 44115

RE: Goldstein et al. v. Cox et al.

Dear Sir:

I respond to your letter of May 20, 1968. You pose certain questions which I do not believe it to be my responsibility to answer.

If you had given me the index number of the case I might have been in a position to quickly ascertain the information which you desire and supply it, but I do not consider it my obligation to consult the indices of this court to ascertain the docket number of the case in which you are interested.

Finally, if you are appearing in this court for the purposes of this case only, I would appreciate your supplying me with the name and address of a member of the bar of this court authorized to represent you here.

Very truly yours,

SIDNEY SUGARMAN.

APPENDIX G.

STATE OF NEW YORK
DEPARTMENT OF AUDIT AND CONTROL
ALBANY

August 5, 1968

NASTA, Juliu, attorney-in-fact for
Opreana Comanicu
J. P. Morgan & Company
Year 1955, Sheet 3, Line 7
Account: BD 47801
Abandoned Property

John R. Vintilla, Esq.
550 Hanna Building
Cleveland, Ohio 44115

Dear Sir:

Reference is made to your inquiry dated July 31, 1968.

Please be advised that there has been no change in the policy of this Department not to transmit any funds to persons residing in Romania or to attorneys-in-fact for such persons.

We have been advised that the Zschernig case, referred to in your letter, does not apply to the situation involved herein and that the Goldstein case is now on appeal before the United States Court of Appeals for the Second Circuit. Our policy wil continue in effect pending determination of the issues presented in the Goldstein case.

Very truly yours,

ARTHUR LEVITT,
State Comptroller,

By J. J. MULLENS,
Assistant Director.

A.L.Kleigman/md

COPY

FILED
MAR 25 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~1968~~ 66

ANGHEL GOLDSTEIN, a/k/a Andrei Pietraru, IULIU NASTA, a/k/a Julius Nasta and GHEORGHE FUNDI,

On behalf of themselves and all others similarly situated,

Appellants,

against

JOSEPH A. COX and SAMUEL DIFALCO,
Surrogates of the County of New York,

EDWARD F. SILVER,
Surrogate of the County of Kings,

CHRISTOPHER C. MCGRATH,
Surrogate of the County of Bronx,

JOHN T. CLANCY,
Surrogate of the County of Queens,

ARTHUR LEVITT,
State Comptroller,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO DISMISS OR AFFIRM

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DANIEL M. COHEN
Assistant Attorney General
of Counsel

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellees.

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1146

ANGHEL GOLDSTEIN, a/k/a Andrei Pietraru, IULIU NASTA, a/k/a Julius Nasta and GHEORGHE FUNDI,

On behalf of themselves and all others similarly situated,

Appellants,

against

JOSEPH A. COX and SAMUEL DIFALCO,
Surrogates of the County of New York,

EDWARD F. SILVER,
Surrogate of the County of Kings,

CHRISTOPHER C. MCGRATH,
Surrogate of the County of Bronx,

JOHN T. CLANCY,
Surrogate of the County of Queens,

ARTHUR LEVITT,
State Comptroller,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of this Court's Revised Rules, appellees move: To dismiss the appeal taken from the order of the United States District Court for the Southern District of New York, which denied appellants' motion for

summary judgment; or in the alternative, to affirm said order. We so move on the ground that, at this stage of this action, the question sought to be presented is so insubstantial as not to merit or require further argument.

Question Presented

The terms of the New York statute (Surr. Ct. Proc. Act, § 2218 formerly Surr. Ct. Act, § 269-a), attacked as unconstitutional, are valid and have survived several prior attacks in this Court. *Matter of Braier,* 305 N. Y. 148, 691 (1953), app. dism., *sub nom. Kalmane* v. *Green,* 346 U. S. 802 (1953); *Matter of Marek,* 11 N Y 2d 740 (1962), app. dism. *sub nom. Ioannou* v. *New York,* 371 U. S. 30 (1962); rehearing denied, 391 U. S. 604 (1968).

The *only question* presented by this record is whether the District Court correctly rejected appellants' meagre affidavits, which related mainly to matters antedating the decisions in *Matter of Leikind,* 22 N Y 2d 346 (June, 1968) and *Zschernig* v. *Miller,* 389 U. S. 429 (Jan. 1968), as a basis for holding, summarily as requested by appellants, that the terms of the statute were being applied in an unconstitutional manner.

Statement

(1)

When this case was last before this Court (389 U. S. 581), on petition for certiorari, a "judgment" which merely refused to order the convening of a three-judge court was vacated and the case was remanded to the Court of Appeals for the Second Circuit "for further consideration in light of *Zschernig* v. *Miller,* 389 U. S. 429", decided the same day. The Court of Appeals, without further argument and upon reconsideration, reversed the order of the District Court denying the application to convene a

three-judge court and remanded the case for consideration of the constitutional issues presented by the complaint. 391 F. 2d 586 (March 8, 1968). The Court of Appeals, upon such reconsideration, observed that this Court in *Zschernig,* had interpreted *Clark* v. *Allen,* 331 U. S. 503, as being "concerned with the words of a [state] statute on its face, not the manner of its application"; and noted the fact that in *Zschernig,* this Court had held that "the history and operation" of a similar Oregon statute constituted "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress". 391 F. 2d, at p. 587.

(2)

The *appellants* then moved, before a *single* District Court Judge, for summary judgment. By reason of the Court of Appeals order, entered upon "reconsideration upon remand by the Supreme Court of the United States", remanding the issues to a *three-judge* court for reconsideration, the appellees opposed assumption of jurisdiction over the issues by a single District Court judge (Attorney General's affidavit, sworn to April 24, 1968).

On June 13, 1968, District Judge McLean notified the parties that "plaintiff's motion for summary judgment will be heard before the Court of three judges duly designated herein on June 25, 1968." Counsel were required by the District Court order to file all papers pertinent to the disposition of the motion by June 20, 1968.

On behalf of the appellees, the Attorney General filed with the three-judge court a supplemental affidavit, sworn to June 20, 1968, to show that there were issues of fact in dispute with reference to the "application" of the terms of the statute here involved which prevented the granting of the relief sought by the plaintiffs. The Attorney General called the Court's attention, in addition, to the fact that the Surrogates named as defendants exercised juris-

diction in only four of the State's 62 counties; and that their decisions, like those of all the other Surrogates in the State, were reviewable by the Court of Appeals of the State, whose then very recent decision in *Matter of Leikind*, 22 N Y 2d 346 (June 14, 1968), was called to the attention of the three-judge Court, as evidence of the fact that the highest Court of the State was cognizant of this Court's decision in *Zschernig* and had decided the *Leikind* case in the light of the *Zschernig* decision. The Attorney General suggested that the purpose of the summary judgment motion was to avoid a hearing at which evidence could be produced to show that New York's statute, constitutional on its face, was being applied in a constitutional manner. As an indication of New York's method of application of the statute, the Attorney General also called the three-judge Court's attention to the fact that the New York Court of Appeals, on the very same day it decided *Matter of Leikind* (*supra*), had denied the Attorney General's motion for leave to appeal from an order of the Appellate Division, Third Department, directing the transmission of an alien beneficiary's share to Poland (*Matter of Krasowski*, 22 N Y 2d 827), and referring to its *Leikind* decision, in denying such leave. See also 28 A D 2d 180 (3d Dept., 1967), the decision appealed from in *Krasowski*. And see *Matter of Kina*, 23 N Y 2d 720 (Nov. 1968), aff'g 29 A D 2d 563 (2d Dept., 1967).

In *Matter of Leikind*, Judge BREITEL, writing for the New York Court of Appeals, held that the petitioner in that case had "made no showing that the lower courts in this case have currently engaged in the conduct criticized, and additionally illustrated in the footnotes of the *Zschernig* case, as interference with foreign relations" (22 N Y 2d at p. 352). New York, clearly, is cognizant, therefore, of the problem of applying its statute in a manner which would be federally constitutional under the tests set forth in this Court's prevailing opinion in *Zschernig*.

(3)

In support of their summary judgment motion, appellants referred only to isolated cases in which the New York Courts had applied the statute in question. In response, the Attorney General set forth not an exhaustive list, but examples of cases where the New York Courts had directed transmission of payments to foreign residents to whom transmissions were found to be feasible, even in situations where the persons resided in countries which had not been removed from the list of countries to which, pursuant to Treasury Regulation, federal funds might not be transmitted (Attorney General's affidavit of June 20, 1968, paragraph 13).*

The Attorney General's affidavit also noted the fact that the federal government had long recognized the power of the States to regulate the succession and distribution of the estates of persons located within the individual States. *United States* v. *Fox*, 94 U. S. 315 (1877); *Irving Trust Co.* v. *Day*, 314 U. S. 556, 562 (1942). The Attorney General also set forth his information that the State Department declined to make a judgment, as to whether in certain Soviet States, Soviet heirs do receive benefit or use or actual enjoyment of estate shares (A. G. affid. of June 20, 1968, par. 14).

(4)

No testimony was offered by appellants upon the hearing of their motion for summary judgment. They rested upon an oral argument that this Court's decision in *Zschernig* compelled the invalidation of the New York statute, since application of the statute necessarily required an "invasion of foreign policy" (Minutes, p. 9).

---

* The constitutionality of the 1968 amendment to Surr. Ct. Proc. Act, § 2218, enacted by L. 1968, ch. 998, which restricts transmission of estate funds to countries to which federal funds may not be transmitted by reason of federal order or regualtion, is not involved on this appeal (Minutes, p. 53).

ARGUMENT

In the light of *Gorun* v. *Fall*, 37 U. S. Law Week 3261 (decided Jan. 20, 1969), where this Court affirmed the denial of summary judgment in a similar case arising from a United States District Court in Montana, the order appealed from should also be affirmed or this appeal should be dismissed since it presents no substantial federal question.

(1)

In *Gorun* v. *Fall*, —— U. S. ——, 21 L. Ed. 2d 628, 37 U. S. Law Week 3261 (decided January 20, 1969), this Court rejected all the arguments which appellants seek to have the Court consider here. Because the decision, although it involved a reciprocity statute, is so apposite, we reproduce it in full:

> "496. *Gorun* v. *Fall*. Per Curiam. The motion to affirm is granted and the judgment is affirmed.
>
> "Mr. Justice Douglas, with whom Mr. Justice Black, Mr. Justice Harlan, and Mr. Justice Fortas concur.
>
> "Appellants are nonresident aliens living in Romania who were named as beneficiaries of an estate being probated in Montana. It has been assumed for the purpose of this appeal that they will receive from that estate unless prevented by the Montana reciprocal inheritance statute (Mont. Rev. Codes § 91-520) which would condition their distribution upon a showing that Romania similarly allows citizens of this country to receive, and to enjoy here, property bequeathed in Romania. While the estate was being administered in the state courts of Montana, appellants filed this complaint to have the three-judge court declare the statute unconstitutional and to enjoin its application. After issue was joined, they moved for summary judgment on the authority of *Zschernig* v.

Miller, 389 U. S. 429, in which we struck down the Oregon reciprocal inheritance statute as an impermissible interference with federal power over foreign affairs.

"Federal policy permits the free flow of funds to Romania. On March 30, 1960, we entered into an agreement with Romania, by which we agreed to release all blocked assets belonging to Romania. See 25 Fed. Reg. 3458.

"At the same time, Romania was removed from the list of countries to which the sending of public funds is prohibited. See 25 Fed. Reg. 3526; 31 CFR § 211.2. As our opinion in *Zschernig* makes clear, a state probate judge is not authorized to make or apply a probate rule contrary to that federal policy.

"The three-judge court dismissed the complaint, saying: '[T]he Montana court now advised by *Zschernig* of the boundary of the constitutional power of the state . . . should feel free to fashion a procedure for applying § 91-520 in a manner not offensive to the Federal Constitution.'

"While the four of us have no objection to summary disposition of this appeal, dismissal seems singularly inappropriate in light of our recent decisions saying over and again that a federal claim in a federal court should be decided by the federal court and not relegated to a state tribunal. See *Zwickler* v. *Koota*, 389 U. S. 241, 250-252. In spite of our aversion to abstention, see id., *Dombrowski* v. *Pfster*, 380 U. S. 479, 486-487, it would be better judicial administration to hold the federal case, pending resolution of the state proceeding, than to dismiss it in the face of clear-cut federal policy in favor of the claim of appellants. Cf. *Kaiser Steel Corp.* v. *Ranch Co.*, 390 U. S. 593."

The three-judge court in *Gorun* had, as here, denied the appellants' motion for summary judgment, 287 F. Supp. 725. And, as we noted in our brief in an earlier case, the

door to the Surrogate's Court in New York is open to the presentation of any claims for the payment of any estate shares to which appellants may be entitled. *Ioannou* v. *New York*, 391 U. S. 604 (1968).

In one of the cases which appellants cite (p. 2) as a basis for invoking this Court's jurisdiction, the way had been pointed for a similar result here: state court disposition of the issues presented. *St. John* v. *Wisconsin Board*, 340 U. S. 411, 414 (1951), citing *Douglas* v. *Jeannette*, 319 U. S. 157, 165 (1943). There is no ground to suppose that, particularly in the light of the decision in *Matter of Leikind*, 22 N. Y. 2d 346 (1968), that the intervention of a federal court will be either necessary or appropriate to secure appellants' constitutional rights.

(2)

Upon the present record, it is unnecessary to stress the obvious fact that every inquiry by a state court into the subject of the interpretation of a foreign country's law does not necessarily involve the state court in an adventure into the field of foreign affairs. *Matter of Leikind* (*supra*, at pp. 351, 352). Nor need we emphasize now the need for the federal courts "not to impinge upon the prerogatives and responsibilities of the political branches of the government in the extremely sensitive and delicate area of foreign affairs". *United States* v. *First National City Bank*, 396 F. 2d 897, 901 (2d Circ., 1968); citing, as an example, *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U. S. 103, 111 (1948).

The appellants have failed to observe what was also so succinctly stated in the *First National Bank* case (*supra*, at p. 901):

> "Mechanical or overbroad rules of thumb are of little value; what is required is a careful balancing of the interests involved and a precise understanding of the facts and circumstances of the particular case."

CONCLUSION

The order of the three-judge Court, appealed from, should be affirmed, or this appeal should be dismissed.

Dated: New York, New York, March 17, 1969.

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorneys for Appellees.

Samuel A. Hirshowitz
First Assistant Attorney General

Daniel M. Cohen
Assistant Attorney General
of Counsel

MOTION FILED
MAR 25 1969

FILED
APR 28 1969
SUP. CT. U.S.

IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted] 66

ANGHEL GOLDSTEIN, aka Andrei Pietraru, IULIU NASTA, aka Julius Nasta and GHEORGHE FUNDI, on behalf of themselves and all others similarly situated,

Appellants,

vs.

JOSEPH A. COX and SAMUEL DiFALCO, Surrogates of the County of New York, EDWARD F. SILVER, Surrogate of the County of Kings, CHRISTOPHER C. McGRATH, Surrogate of the County of Bronx, JOHN T. CLANCY, Surrogate of the County of Queens, ARTHUR LEVITT, State Comptroller,

Appellees.

On Appeal From the United States District Court
For the Southern District of New York.

PETITION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

Wolf Popper Ross Wolf & Jones,
By Martin Popper,
845 Third Avenue,
New York, New York 10022,
Amicus Curiae.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

ANGHEL GOLDSTEIN, *et al.*,

Appellants.

VS.

JOSEPH A. COX, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

PETITION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Petitioners herein are attorneys-at-law, duly admitted to practice in all of the state courts of the State of New York, and three of them, including the undersigned, are admitted to practice before the Bar of the Supreme Court of the United States.

Petitioners are the attorneys for the Chiefs of the Consular Sections of the Embassies of the Union of Soviet Socialist Republics, Czechoslovakia, Hungary, Bulgaria and for the Consul General of Poland, in connection with their representation of the interests of their nationals who are legatees and distributees in estates in the City and State of New York. We also represent the Chief of the Consular Section of the Romanian Embassy in numerous estate matters in the City of New York. Petitioners also represent, under powers of attorney, the legal interests of

hundreds of legatees and distributees in estates in the City and State of New York who are nationals of the above-described countries and persons who are nationals of the German Democratic Republic and Albania.

The decision of this Court in this case will necessarily affect the legal interests of all of our above-described clients.

The complaint in this case challenges the constitutionality, on its face and as it has been applied, of Section 2218 of the Surrogate's Court Procedure Act of the State of New York as an invasion by the State of New York of the exclusive power of the Federal government to conduct foreign relations. Since 1951, petitioners have been involved in the presentation of this constitutional issue in the courts throughout the State of New York from the Surrogate's Courts to the Court of Appeals, the highest Court of the State. Petitioners first raised this issue before this Court in 1953, *Matter of Braier*, 305 N. Y. 148, 691 (1953), *appeal dismissed sub nom.; Kalmane* v. *Green*, 346 U. S. 802 (1953).

Subsequent to the decision in *Zschernig* v. *Miller*, 389 U. S. 429, we asked the Court of Appeals of the State of New York to apply the standards enunciated by this Court to Section 2218 of the Surrogate's Court Procedure Act of New York. The Court of Appeals declined to deal with the constitutional issue, although petitioners in their brief presented a comprehensive history of the manner in which the New York courts had applied Section 2218 of the Surrogate's Court Procedure Act of New York in contravention of the *Zschernig* decision. *Matter of Kina*, 23 N. Y. 2d 720. Previously, the Court of Appeals had decided that Section 2218 is constitutional on its face and that it was unable on the record then before it to find that the statute had been unconstitutionally applied. *Matter of Leikind*, 22 N. Y. 2d 346 (1968).

Petitioners have also presented the same constitutional issue to the New Jersey Supreme Court which found that State's benefit, use and control statute, patterned after the New York statute involved this case, to have been unconstitutionally applied by the New Jersey courts. *Matter of Kish*, 52 N. J. 454.

In the case at Bar, the Court below permitted petitioners to participate as *amicus curiae* both by brief and in the oral argument.

Your petitioners have sought the consent of the parties in this case for the filing of the attached brief. We have received the written consent of John R. Vintilla, Esq., attorney for the appellants, but Daniel M. Cohen, Esq., Assistant Attorney General, representing Louis J. Lefkowitz, Attorney General of the State of New York, informed us that his office would not consent.

Because the time element is short, we are attaching herewith our proposed brief, together with this Motion for Leave to File the Brief, and respectfully request that leave of this Court be granted and that the attached brief be filed in this case.

Dated, March 21, 1969.

Respectfully submitted,

WOLF POPPER ROSS WOLF & JONES
By MARTIN POPPER
Amicus Curiae

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

ANGHEL GOLDSTEIN, *et al.*,

Appellants,

vs.

JOSEPH A. COX, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMICUS CURIAE BRIEF

I

Interest of *Amicus Curiae*

The interest of the *Amicus Curiae* in the subject matter of this case has been set forth in the Petition for Leave to file this *Amicus Curiae* Brief filed concurrently herewith and the statements set forth therein are incorporated herein by reference.

II

Argument

Both the Court below and the Court of Appeals of the State of New York in *Matter of Leikind*, 22 N. Y. 2d 346 (1968), have anticipated that this Court might hold that the New York statute herein involved is unconstitutional on its face.

The Court below read this Court's recent ruling denying a hearing in *Ioannou* v. *New York*, 391 U. S. 604 (1968) "as at least an indication that evidence of improper application of the statute is necessary". The Court of Appeals distinguished the New York statute from the Oregon statute involved in *Zschernig* on the grounds (a) that the New York statute does not contain an escheat provision

and (b) that the decision by this Court in *Zschernig* "in accepting the constitutionality of 'reciprocity' arguably accepted 'benefit, use or control' provisions as valid, provided State courts did no more than 'routinely read' foreign laws and provided there was no palpable interference with foreign relations in their application."

We respectfully submit that the reasoning of the Court below and the Court of Appeals misses the crucial point that the New York statute by its very nature and legislative history impels the State courts to engage in the conduct of foreign relations.

The law became effective in 1939 as Section 269 of the Surrogate's Court Act. There was included in the legislative bill which was subsequently enacted, an explanatory note setting forth the purpose of the amendment, as follows:

> "This amendment is proposed by the Executive Committee of the Surrogates' Association of the State of New York. The purpose of the amendment is to authorize the deposit of monies or property in the Surrogate's Court in cases where transmission of payment to a beneficiary, legatee, or other person resident in a foreign country might be circumvented by compensation in whole or in part. The amendment authorizes the impounding of the fund by the Surrogate to await the time when payment can be made to the beneficiary for his own benefit, use and control." See Bill or Revision Notes to Section 269, Surrogate's Court Act in *Gilbert Bliss, Civil Practice of New York*, annot'd., Book 13B, p. 155.

Almost immediately after the enactment of Section 269 a Surrogate in New York made clear the judiciary's understanding of the legislative purpose of the statute in the following language:

> "It is a matter of *common knowledge* that private ownership of property has been abolished in the Soviet Union, with the result that none of its nationals there resident is permitted by its laws to

> have the personal control of any property, which is deemed to belong solely to the State. In other words, there is here presented the precise situation contemplated in the note to the amendment to Section 269 at the time of its enactment, to the remedy of which the law was passed that 'transmission or payment to a beneficiary, legatee or other person resident in a foreign country might be circumvented by confiscation in whole or in part.' So far as Russian nationals are concerned, such confiscation by and for the use of the government would be of the fund in its entirety and this is not altered by the indication in a current Congressional inquiry that it would be used by the agencies of the Soviet Government in this country to attempt to undermine our institutions and to sabotage our industries." *Estate of Landau*, 172 Misc. 651, 16 N. Y. S. 2d 3 (1939).*

In 1960, the law became Section 269-a of the Surrogate's Court Act and was amended to include a requirement imposing upon *alien* legatees the burden of proving that they would receive the benefit, use and control of monies which might be transmitted to them. The practical effect of this amendment was to provide legislative approval for the kind of hearings which had been conducted by the Surrogate's Courts for more than twenty years. This Court noted its disapproval of this type of State court conduct in *Zschernig*.

The suggestion made by the Court of Appeals in *Leikind*, *supra*, that a distinction might exist between the Oregon statute dealt with in *Zschernig* and the New York statute in this case, on the ground that the Oregon statute provides for escheat while the New York statute is custodial in nature, has since been answered by the opinion of Mr. Justice Douglas in *Ioannou* v. *New York*, *supra*, in which he stated that the rationale of the *Zschernig* decision applies to custodial statutes such as New Yorks' as well as to escheat statutes like Oregon's.

---

* The legislative purpose of the statute was reconfirmed by the Court of Appeals in *Matter of Leikind*, *supra*.

Assuming, *arguendo*, however, that the Court below is correct in its view that *Ioannou* v. *New York*, *supra*, requires evidence of improper application of the statute before it will be found to be unconstitutional, there is ample evidence available that the New York courts have acted and continue to act in contravention of the principles of the *Zschernig* decision.

In our *Amicus* Brief below, we made a survey of the decisional history pertaining to the application of the statute by the New York courts which showed that on all levels from Surrogates' to the Court of Appeals, they have for a quarter of a century engaged in the conduct of foreign relations, often radiating cold war attitudes.

Curiously, although the Court below permitted our participation as *Amicus Curiae*, its opinion omits any reference to the many cases cited by us showing how the New York courts have applied the statute. Instead, it relied solely upon the factual allegations in the complaint as the basis for its finding that there was no record before it of unconstitutional application. But the real record is to be found in the decisions of the courts. In *Zschernig*, the Court found that the Oregon statute had been applied unconstitutionally not in the case before it but generally in many cases over many years.[1]

We anticipate that the Attorney General of the State of New York will argue that jurisdiction should not be noted in this case until the New York courts have had an opportunity to apply the guidelines set forth in *Zschernig* or, in other words, that the appellants should be required to go back to the Surrogate's Courts.[2]

But the fact is that since the decision in *Zschernig*, the Court of Appeals has not adopted a policy which might have caused the Surrogates to discontinue the practice of

---

[1] In *Zschernig*, there had been no hearing in the Oregon State courts on the factual question of reciprocity.

[2] And this, despite the fact that almost eight years ago the State Department, ("In view of the foreign policy aspects of this matter . . ."), requested the Governor of New York to bring "to the attention of the appropriate authorities of your State", the Department's conclusion that legatees or distributees living in Romania have the benefit or use or control of such bequests. Letter of Legal Adviser to Governor Rockefeller, dated Nov. 9, 1961, judicially noted in *Matter of Greenberg*, 46 Misc. 2d 883, aff'd. 24 A. D. 2d 435, leave to appeal denied 17 N. Y. 2d 417.

Noted

conducting the kind of hearings which were proscribed in *Zschernig*. *Matter of Leikind* and *Matter of Kina*, *supra*. Such hearings are taking place at the present time.

It is our position, that it makes no difference whether the Court withholds transmission of the funds or permits its transmission. The question is whether, in the course of reaching its conclusion, the Court applies the statute in an unconstitutional manner. If, in order to make a finding, the Court insists upon conducting hearings which involve it deeply in the conduct of foreign relations, the statute has been applied unconstitutionally and has imposed unfair burdens upon the legatees affected.

Finally, we call the Court's attention to the fact that Section 2218 of the Surrogate's Court Procedure Act was amended again subsequent to this Court's decision in *Zschernig*. The following section was added:

> "1.(a) Where it shall appear that an alien legatee, distributee or beneficiary is domiciled or resident within a country to which checks or warrants drawn against funds of the United States may not be transmitted by reason of any executive order, regulation or similar determination of the United States government or any department or agency thereof, the court shall direct that the money or property to which such alien would otherwise be entitled shall be paid into court for the benefit of said alien or the person or persons who thereafter may appear to be entitled thereto. The money or property so paid into court shall be paid out only upon order of the surrogate or pursuant to the order or judgment of a court of competent jurisdiction.
>
> * * * "

The validity of this amendment was not argued in the Court below because its provisions do not affect the appellants in this case. Nevertheless, the Court quoted the entire statute, including the amendment.

During the argument of a motion before the United States District Court for the Southern District of New York, challenging the constitutionality of this amendment and requesting the convening of a three-judge court, the Assistant Attorney General of the State of New York took

the position that the Court below had found the entire statute constitutional. P. 18, Transcript of Argument of Motion for a Three-judge Court in *Bjarsch* v. *DiFalco*, U. S. D. C., S. D., 68 Civ. 4216 (Jan. 15, 1968), decision pending.

Petitioners contend that the amendment is unconstitutional not only under the *Zschernig* decision but because it violates the due process clause of the Fourteenth Amendment, in that it denies the persons affected by it the right to a hearing at which they might prove that they would have the benefit, use and control of their funds and upon such proof be entitled to receive them.

Conclusion

Because, despite the *Zschernig* decision, the New York courts continue, in cases involving foreign legatees and distributees residing in certain countries, to engage in the conduct of foreign relations counter to the exclusive power granted to the Federal government by the United States Constitution, we urge this Court to find that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

Wolf Popper Ross Wolf & Jones
By Martin Popper
Amicus Curiae

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 66

ANGHEL GOLDSTEIN, aka Andrei Pietraru,
IULIU NASTA, aka Julius Nasta and
GHEORGHE FUNDI,
on behalf of themselves and all others similarly situated,
Appellants,

vs.

JOSEPH A. COX and SAMUEL DiFALCO,
Surrogates of the County of New York,

EDWARD F. SILVER,
Surrogate of the County of Kings,

CHRISTOPHER C. McGRATH,
Surrogate of the County of Bronx,

JOHN T. CLANCY,
Surrogate of the County of Queens,

ARTHUR LEVITT,
State Comptroller,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF APPELLANTS.

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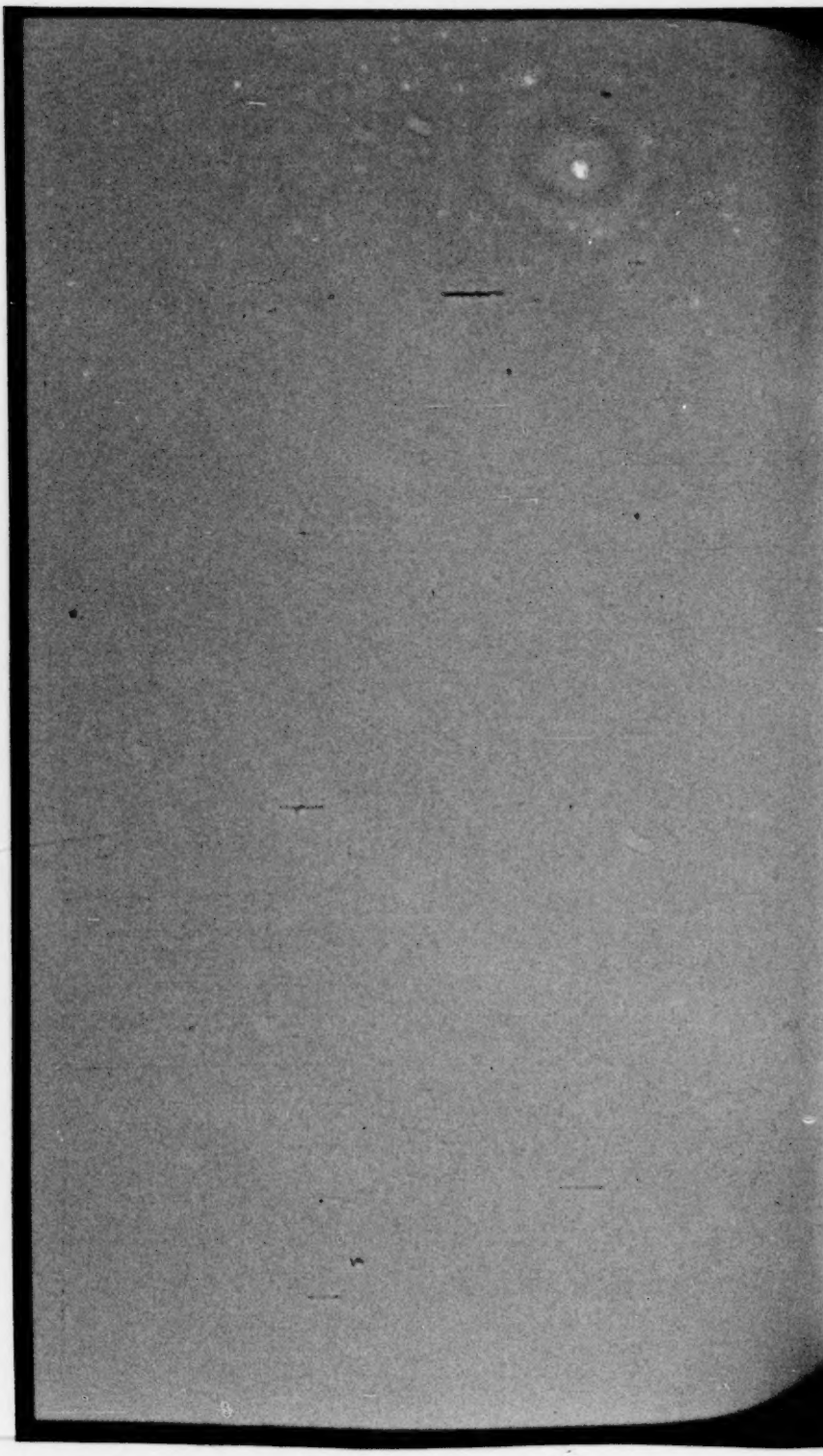

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1146.

ANGHEL GOLDSTEIN, aka Andrei Pietraru,
IULIU NASTA, aka Julius Nasta and
GHEORGHE FUNDI,
on behalf of themselves and all others similarly situated,
Appellants,

vs.

JOSEPH A. COX and SAMUEL DiFALCO,
Surrogates of the County of New York,

EDWARD F. SILVER,
Surrogate of the County of Kings,

CHRISTOPHER C. McGRATH,
Surrogate of the County of Bronx,

JOHN T. CLANCY,
Surrogate of the County of Queens,

ARTHUR LEVITT,
State Comptroller,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF APPELLANTS.

OPINION BELOW.

The opinion of the District Court is unreported and appears in the Appendix (p. 33).

JURISDICTION.

The Order noting Probable Jurisdiction was entered on April 28, 1968. The jurisdiction of this Court to review this decision by direct appeal is conferred by Title 28, U.S.C., §§ 1253 and 2101 (b).

STATUTE INVOLVED.

Section 269-a of the New York Surrogate's Court Procedure Act was amended and became effective on June 22, 1968, as Section 2218, by the addition of paragraph 1, thereto, after the Motion For Summary Judgment was made. Section 2218 now reads as follows:

> "1. (a) Where it shall appear that an alien legatee, distributee or beneficiary is domiciled or resident within a country to which checks or warrants drawn against funds of the United States may not be transmitted by reason of any executive order, regulation or similar determination of the United States government or any department or agency thereof, the court shall direct that the money or property to which such alien would otherwise be entitled shall be paid into court for the benefit of said alien or the person or persons who thereafter may appear to be entitled thereto. The money or property so paid into court shall be paid out only upon order of the surrogate or pursuant to the order or judgment of a court of competent jurisdiction.
>
> (b) Any assignment of a fund which is required to be deposited pursuant to the provisions of paragraph one (a) of this section shall not be effective to confer upon the assignee any greater right to the delivery of the fund than the assignor would otherwise enjoy.
>
> 2. Where it shall appear that a beneficiary would not have the benefit or use or control of the money or other property due him or where other special circumstances make it desirable that such payment should be withheld the decree may direct that such money or property be paid into court for the benefit of the beneficiary or the person or persons who may thereafter appear entitled thereto. The money or property so paid into court shall be paid out only upon order of the court or pursuant to the order or judgment of a court of competent jurisdiction.

3. In any such proceeding where it is uncertain that an alien beneficiary not residing within the United States, the District of Columbia, The Commonwealth of Puerto Rico or a territory or possession of the United States would have the benefit or use or control of the money or property due him the burden of proving that the alien beneficiary will receive the benefit or use or control of the money or property due him shall be upon him or the person claiming from, through or under him."

QUESTIONS PRESENTED.

1. Whether Section 2218 of the New York Surrogate's Court Procedure Act, on its face and in application, is unconstitutional because it encroaches upon and impairs the effective exercise of the power to conduct foreign relations and to regulate foreign commerce which is constitutionally vested in the federal government to the exclusion of the State of New York.

2. May New York deprive an alien residing in Romania of his right to property in New York by reason of a policy which is premised upon Section 2218, when such policy is contrary to the established policy of the Federal Government permitting the free flow of funds to Romania?

3. Whether the statutory scheme of Section 2218 results in a deprivation of property contrary to, and violates the equal protection clause of the Fourteenth Amendment?

STATEMENT OF CASE.

The complaint herein (A. 4) challenges the constitutionality of the New York Surrogate's Procedure Act Section 2218, and the policy of New York predicated on the authority of such statute with regard to the rights of

residents of Romania. The appellants, as victims of such policy whereby funds belonging to them have been and are being withheld from them by the appellees, sought to convene a special tribunal of three judges to pass on the constitutionality of the New York Act and to enjoin its application. Both the District Judge and the Court of Appeals denied the request for a three judge court. On January 15, 1968, this Court, in this case, entered a per curiam order, 389 U. S. 581, whereby it granted certiorari, summarily vacated the judgment of the Court of Appeals, and remanded the case to the Court of Appeals "for further consideration in the light of *Zschernig v. Miller*," 389 U. S. 429. On March 8, 1968, the Court of Appeals entered its order remanding *Goldstein* back to the District Court "for consideration of the constitutional issues by a three judge court pursuant to 28 U. S. C. Section 2281." In view of the decision in *Zschernig*, the appellants moved for summary judgment after issue was joined (A. 10).

Inexplicably, the motion for summary judgment came on for hearing on April 23, 1968, before one District Judge who did nothing at the time except indicate that he would take the matter under advisement. After some confusion, the motion for summary judgment was heard by a three judge court on June 24, 1968, and, on December 20, 1968, said court entered its order denying the motion for summary judgment (A. 41).

It is not disputed that the appellants have been held to be the lawful distributees of New York estates, and that under the laws of New York, they now have and have had, since the time of distribution of the estate, a right to receive the proceeds representing their distributive share. At the time of distribution in each of the estates involving the rights of romanian claimants, the Surrogate decrees the automatic and instanteous withholding of the funds

pon learning that the distributee is a resident and ational of Romania (A. Doc. 18, par. 6, 7, 8).

On March 30, 1960, an agreement relating to financial uestions was concluded at Washington, D. C., between ur government and that of Romania. As a result thereof, omania was removed from the proscribed list of the nited States Treasury Department enumerating countries which federal funds may not be transmitted and, furermore, all federal regulations of a blocking nature egarding Romanian nationals were removed, 31 C. F. R. ection 211.2(a), 25 Federal Regulations, pages 3456, 3526. he present policy of the United States recognizes that here is a reasonable assurance that a payee in Romania ill actually receive a check or warrant drawn against unds of the United States, and will be able to negotiate it r full value. Ever since April of 1960, the United States as been remitting checks and warrants representing ocial security benefits, veterans pensions and other public unds to residents of Romania without any problem or ifficulty as to receipt, and regarding use, benefit and ontrol of the funds by the recipient thereof.

Many of the plaintiffs, who are in dire need of the unds, have been waiting in excess of twenty years for heir money from New York.

Subsequent to the decision of the New York courts n the *Matter of Greenberg*, Motion for Leave To Appeal enied, December 30, 1965, 17 N. Y. 2d, 417, 46 Misc. 2d, 83, 24 App. Div. Rep. 2d, 435, the policy of New York rohibiting the transfer of funds to a resident of Romania as applied with renewed vigor and purpose by the Surroates and authorities of New York (A. Doc. 18, par. 3a, , 6, 7, 8).

Upon consideration of the matter below, the District ourt completely ignored the established policy of the

Federal Government in permitting the free flow of funds to Romania, without in any way commenting about its relevancy to the legal issue before it.

ARGUMENT.

1. The policy of New York, which is premised upon Section 2218 of the Surrogate's Court Procedure Act, is an unconstitutional interference with the exclusive power of the federal government to conduct the foreign affairs of this country, as held in *Zschernig v. Miller*, 389 U. S. 429.

The policy of the State of New York, which petitioners challenge as unconstitutional, is accurately set forth by the appellee Surrogate of King's County in his letter of October 15, 1965, in reply to a request addressed to him by an heir in Romania for the release and immediate payment of his distributive share in the modest amount of $2,989.63. The pertinent portion of said appellee's letter reads as follows:

> "I have given serious consideration to your letter of August 28, 1965, in which you request the release of your distributive share in the above estate. It is the public policy of the State of New York to withhold distribution to legatees who would not have the benefit or use or control of their bequest. The Appellate Courts of this State have held that residents of Rumania are within this description. As a Judge of the Surrogate's Court I am bound by the ruling of the higher court, and as an individual I am in full agreement with it. Accordingly, and despite my personal desire to help you because of your advanced age, physical infirmity and need for the money, I must advise you that if formal application for the payment of your bequest in full is made to me, I would be constrained to deny the same." (A. Doc. 18, par. a,

affidavit in Support of Motion for Summary Judgment.)

A recent and the latest affirmation by the Courts of New York of this policy regarding Romania is to be found in the Surrogate's decision in *In re Greenberg*, 46 Misc. 2d 883, 261 N.Y.S. 2d 176 (Surr. Ct. 1964) aff'd 24 App. Div. 2d 435 (1st Department 1965) leave to appeal denied, 17 N. Y. 2d 417 (December 30, 1965).

It is difficult to comprehend the statement in the opinion of the lower court that "in the case before us there is no showing that New York courts have engaged in the conduct criticized in Zschernig," in the light of the facts set forth in paragraphs 3(a), (b), 4, 5, 6, 7, and 8 of the affidavit in support of the motion for summary judgment (A. Doc. 18). A few excerpts therefrom will readily reveal the fallacy of the court's conclusion. The appellee, Comptroller of the State, stated regularly, as follows:

> "* * * pursuant to a policy recommended by our Attorney General, we are not able to effect payments to residents of certain Eastern European Countries, including Romania because the situation exists which makes it doubtful as to whether the recipients of our checks would receive full value for the dollar amount."
>
> "* * * The Department of Law however has advised us that it will continue its position as to payments to distributees domiciled in Rumania. A recent decision in the Surrogate's Court, New York County (Matter of Greenberg, New York Law Journal, June 16, 1964) upheld the position of the Attorney General of the State."
>
> "* * * the policy of this Department is to withhold any such payments until and when the parties residing within such countries are outside of the jurisdiction of the Soviet Union."

"* * * this Department will not honor any claims from Rumanian nationals at the present time. March 4, 1963."

In addition, the court had before it various decrees of the New York Surrogates which provided for automatic withholding of funds belonging to Romanian distributees "pursuant to Section 269-a of the Surrogate's Court Act (Matter of Greenberg, NYLJ, June 16, 1964, Cox. S.) aff'd App. Div. 1st Dept. NYLJ." Since the decision in *Greenberg*, the funds belonging to a Romanian beneficiary have been and are ordered withheld instantly, on such authority, without according the beneficiary or his legal representative an opportunity to challenge the decree. It has been and still is the unalterable policy of Courts and authorities of New York to withhold funds of Romanian nationals for the sole reason that the beneficiary resides in Romania.

Interestingly enough, the lower court did not find the policy of New York, and, the application of its so-called "Iron Curtain" law, offensive to the Federal Constitution despite the findings and conclusions of the New York courts in the case of *In re Greenberg* (A. Doc. 18, pars. 4, 5, 6, affidavit in support of motion for summary judgment). In that case, both the Surrogate and the Appellate Court premised their conclusions upon the foreign exchange laws of Romania, which they erroneously considered confiscatory and unfair, and upon other internal conditions and circumstances in the country. This, however, was inconsequential to the lower court in its consideration of the foreign affairs aspect of the problem.

Following the decision of this Court in *Zschernig*, undersigned counsel requested payment of the funds belonging to appellant, Iuliu Nasta, from the appellee-state comptroller, Arthur Levitt. In response thereto, said appellee stated:

"Reference is made to your inquiry dated July 31, 1968. Please be advised that there has been no change in the policy of this Department not to transmit any funds to persons residing in Romania or to attorneys-in-fact for such persons. We have been advised that the *Zschernig* case referred to in your letter, does not apply to the situation involved herein and that the *Goldstein* case is now on appeal before the United States Court of Appeals for the Second Circuit. Our policy will continue in effect pending determination of the issues presented in the *Goldstein* case."

In other pending cases, Surrogates have upheld the constitutionality of Section 2218 upon the ground that *Zschernig* did not pass upon or decide the constitutionality of the New York statute, or that *Matter of Braier*, 305 N. Y. 148, appeal dism'd sub nom., *Kalmane v. Green*, 346 U. S. 802 (1953), is still controlling despite *Zschernig*, *Matter of Zadlo* (Surrogate's Court, Westchester County #10473) (*Matter of Harmoza*, Surrogate's Court, Nassau County), NYLJ, May 27, 1968, p. 26, col. 1.

This present attitude on the part of New York is strange, indeed, in view of the representation of the Attorney General of New York to this Court in the case of *Ioannou v. New York*, No. 191, October Term, 1967.

We believe that the conclusions to be drawn from *Zschernig* indicate clearly that statutory restrictions such as contained in the New York law constitute an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and Congress. In this respect, the Court stated:

"* * * Yet, such forbidden state activity * * * has infected *each* of the three provisions of Section 11.070, as applied by Oregon." (Emphasis ours.)

Section 2218 of the New York statute, requiring a showing by the foreign heir that he will have the benefit,

use or control of the funds due him, is identical with one of the three provisions of the Oregon act which was struck down by this Court as an impermissible interference with federal power over foreign affairs. This Court, in *Zschernig*, extended its opinion to the statutes and decisions of California, Montana, New York and Pennsylvania with a view, we believe, to making clear that "the rationale of that decision applies to custodial statutes such as New York as well as to escheat statutes like Oregon's."

That the New York statute cannot be applied effectively without involving the courts in the kind of foreign relations activities proscribed by the Constitution, has been made equally clear by Mr. Justice Stewart, in his concurring opinion in *Zschernig*, in which he was joined by Mr. Justice Brennan, wherein he stated, as follows:

> "I believe that all three of the statutory requirements on their face are contrary to the Constitution of the United States. In my view, *each* of the three provisions of the Oregon law suffers from the same fatal infirmity. *All three launch the State upon a prohibited voyage into a domain of exclusively federal competence.* Any realistic attempt to apply any of the three criteria would necessarily involve the Oregon courts in an evaluation, either expressed or implied, of the administration of foreign law, the credibility of foreign diplomatic statements, and the policies of foreign governments. Of course, state courts must routinely construe foreign law in the resolution of controversies properly before them, but *here the courts of Oregon are thrust into these inquiries only because the Oregon legislature has framed its inheritance laws to the prejudice of nations whose policies it disapproves and thus has trespassed upon an area where the Constitution contemplates that the only National Government shall operate.*" (Emphasis supplied.)

It is readily apparent from the foregoing declaration that the New York statute "suffers from the same fatal infirmity."

2. The policy of the State of New York, being challenged herein, is contrary to the policy of the Federal Government, which permits the free flow of funds to Romania, and therefore, must yield.

In the recent appeal to this Court from the decision of a three judge district court in Montana, *Gorun et al. v. Fall, et al.*, No. 496, Oct. Term, 1968 decided January 20, 1969, 393 U. S. 398, Mr. Justice Douglas, in an opinion concurred in by Mr. Justice Black, Mr. Justice Harlan and Mr. Justice Fortas, declared relevant hereto, as follows:

> "Federal Policy permits the free flow of funds to Romania. On March 30, 1960, we entered into an agreement with Romania, by which we agreed to release all blocked assets belonging to Romania. See 25 Fed. Reg. 3458. At the same time, Romania was removed from the list of countries to which the sending of public funds is prohibited. See 25 Fed. Reg. 3526; 31 CFR s s 211.2. *As our opinion in Zschernig makes clear, a state probate judge is not authorized to make or apply a probate rule contrary to that policy.*" (Emphasis supplied.)

That the action of the Federal Government in concluding the Financial Agreement of 1960 with Romania constitutes new foreign policy with relation to that country is clear. In view of this agreement, the Secretary of the Treasury of the United States determined that residents and nationals of Romania would have the use, benefit or control of money transmitted to them from the United States. Agreements entered into by our govern-

ment have the same force and effect and attain the same stature as treaties in the formulation of foreign policy. This foreign policy determination by the Executive Department of the United States overrides any conflicting determination that the courts of New York have made or seek to make pursuant to the policy of the state as set forth in Section 2218. With regard hereto, this Court, in *Kolovrat v. Oregon*, 366 U. S. 187 (1961), declared:

> "* * * state policies as to rights of aliens to inherit must give way under our Constitution's Supremacy Clause to 'overriding' federal treaties and conflicting arrangements."

For "state law must yield when it is inconsistent with, or impairs the policy or provisions of a treaty or of *an international compact or agreement.*" *United States v. Pink*, 315 U. S. 203, 231 (1942). (Italics ours.)

The Court also stated in *Pink*, page 233:

> "No state can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the State; it is vested in the national government exclusively. * * *."

In cases in which funds were withheld from heirs behind the so-called "Iron Curtain," New York relied upon and consistently followed established federal policy whenever the beneficiary was domiciled or resident within a country to which checks or warrants drawn against funds of the United States could not be transmitted. In the leading case on the subject, *Matter of Braier*, 305 N. Y. 148 (1953), appeal dismissed sub. nom. *Kalmane v. Green*, 346 U. S. 802 (1953), the court pointed out that the federal government was in a better position than New York to determine whether or not a resident heir of a New York estate would be likely to receive and have the use, benefit and control of funds sent to him, and as a consequence

thereof, followed the policy of the United States Treasury Department which prohibited the transfer of funds. In *Braier,* the New York Court of Appeals followed the restrictive provision of the Treasury Regulation and concluded therefrom that local conditions in Hungary were such that there was no reasonable assurance that a payee in that country would actually receive the money and have the use and control of same.

In situations wherein New York sought to prohibit the transfer of funds behind the "Iron Curtain," the practice of yielding to federal policy was widespread. The courts in New York had prohibited and prohibit (Section 2218, 1.(a)) the transmittal of funds to heirs behind the Iron Curtain by relying upon established federal policy (U. S. Treasury Department Circular 655) in applying said statute.

To show how widespread and complete was the reliance upon federal policy as established by the Treasury Department, we invite your attention to some additional authoritative statements. In the case of *Danisch v. Guardian Life Insurance Company,* 151 F. Supp. 17, the District Judge in his opinion of April 18, 1957, stated, as follows:

> "The general conditions prevailing in a Communist Country are indeed of such common knowledge as to require no proof of their fundamental antithesis to the public policy prevailing in our own country. Yet in the absence of proof, it is inadvisable for a court to hold, on the basis of judicial notice alone, that the general conditions negate the specific likelihood that these plaintiffs would receive the proceeds of a judgment. There can, of course, be judicial knowledge of specific circumstances sufficient to justify a decision, see In re Weidberg's Estate supra; but as distasteful as the court considers the general conditions in Poland to be, he has no judicial knowl-

edge to justify the specific conclusion that these plai tiffs would not receive payment. However, the vo of judicial knowledge may be filled by the Treasu Regulation precluding the payment of United Stat government funds to persons residing in the Poli People's Republic, because of a finding of a lack reasonable assurance that the payees will actual receive such funds or be able to negotiate checks warrants for full value. *This 'authoritative conclusi reached by the Treasury Department'* was relied up for decision in re Braier's Estate, supra, 305 N. Y. page 157, 111 N. E. 2d at page 428." (Emphasis su plied.)

Some very interesting statements regarding our pro lem were made by James L. Murray, Assistant to the Su rogate, New York County, in a paper which he submitt at "A Symposium Before The Consular Society," entitl "Letters Rogatory," edited by Bernard A. Grossman, a published by Federal Legal Publications, Inc., New Yor 1956. At pp. 46-47, Mr. Murray stated as follows:

"* * * Thus, at the very inception of the estate a ministration the Surrogate invokes the finding of fa of the United States Secretary of the Treasury to t effect that the postal, banking and transportati facilities in certain European countries are such th there is not a reasonable assurance that a payee those countries would have the benefit, use or contr of any property transmitted to him (16 Fed. Re 1818, Treasury Department Circular 1951, 655, Sup 7)."

Here, apparently, is an expert advisor to the Surr gate in New York County who states emphatically th the determination of fact made by the Treasury Depar ment that a resident in certain countries would not ha the benefit, use or control of any property transmitted

him "should be accepted as conclusive unless there is a clear unmistakable proof of a change in our foreign policy based upon a reappraisal of the internal law of Russia since the federal regulation in question was issued."

The New Jersey court in the case of *In re the Estate of Markewitsh*, 62 N. J. Super 407 (Passaic Cty. Ct. 1960), also felt that the Federal Government was the best qualified agency to determine whether the beneficiaries residing in foreign countries would be able to enjoy the use, benefit and control of money forwarded from this country.

In the more recent case of *Brizgys v. County Treasurer of Union County*, 84 N. J. Super. 485, 498-499 (App. Div. 1964), the court stated:

> "it is argued that the funds here are not being transmitted in the manner indicated by the Secretary of the Treasury regulation—that we are concerned with private funds passing through private channels. We find the distinction unimportant. As was said in In Re Wells' Estate, 204 Misc. 975, 126 N. Y. S. 2d 441 (Surr. Ct. 1953), the important factor is whether there is a reasonable assurance that the distributee will actually receive the monies to which it is entitled. And see in Re Markewitsh, 62, N. J. Super., at pages 409, State v. Pakarek, 234 Ore. 74, 378 P. 2d 734, 737-8 (Sup. Ct. 1963)."

It is readily apparent, we believe, that Section 2218 and its predecessor 269-a, of the Surrogate's Court Procedure Act, constitute an attempt on the part of New York to give effect to a politically inspired policy of preventing funds from going to certain Eastern countries of Europe solely because of New York's disapproval of the government and policies of those countries. What logical explanation can there be for New York's refusal to respect and follow the affirmative and overriding policy of the

United States Treasury Department which permits the "free flow of funds to Romania," when, on the other hand, it applies such federal policy, as the "authoritative conclusion of the Treasury Department" in order to prohibit the payment of funds to a party who resides in such a country? This relevant and important question has never been answered by the New York courts, not even the lower court in the instant case, although the issue was squarely before it.

We submit, however, that the only policy, constitutionally correct, that New York may pursue with regard to the rights of an heir residing in Romania, would be one that permits rather than prohibits the "free flow of funds to Romania."

CONCLUSION.

The decision of the District Court should be reversed, the New York Surrogate's Court Act, Section 2218, declared unconstitutional and that New York be ordered and directed to deliver, without undue delay, all funds which are due and owing and will be due and owing to these plaintiffs and all others similarly situated.

Respectfully submitted,

JOHN R. VINTILLA,

Attorney for Appellants.

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IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted] 66

ANGHEL GOLDSTEIN, a/k/a Andrei Pietraru, IULIU NASTA, a/k/a Julius Nasta and GHEORGHE FUNDI, on behalf of themselves and all others similarly situated,

Appellants,

vs.

JOSEPH A. COX and SAMUEL DiFALCO, Surrogates of the County of New York, EDWARD F. SILVER, Surrogate of the County of Kings, CHRISTOPER C. McGRATH, Surrogate of the County of Bronx, JOHN T. CLANCY, Surrogate of the County of Queens, ARTHUR LEVITT, State Comptroller,

Appellees.

BRIEF OF AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

ANGHEL GOLDSTEIN, a/k/a Andrei Pietraru, IULIU NASTA, a/k/a Julius Nasta and GHEORGHE FUNDI, on behalf of themselves and all others similarly situated,

Appellants,

vs.

JOSEPH A. COX and SAMUEL DIFALCO, Surrogates of the County of New York, EDWARD F. SILVER, Surrogate of the County of Kings, CHRISTOPHER C. MCGRATH, Surrogate of the County of Bronx, JOHN T. CLANCY, Surrogate of the County of Queens, ARTHUR LEVITT, State Comptroller,

Appellees.

BRIEF OF AMICUS CURIAE

Interest of *Amicus Curiae*

Amicus Curiae herein are attorneys-at-law, duly admitted to practice in all of the state courts of the State of New York, and three of them, including of counsel herein, are admitted to practice before the Bar of this Court.

We are the attorneys for the Chiefs of the Consular Sections of the Embassies of the Union of Soviet Socialist Republics, Czechoslovakia, Hungary, Bulgaria and for the Consul General of Poland, in connection with their representation of the interests of their nationals who are legatees and distributees in estates in the City and State of New York. We also represent the Chief of the Consular Section of the Roumanian Embassy in numerous estate matters in the City of New York and, under powers of attorney, the legal interests of hundreds of legatees and

distributees in estates in the City and State of New York who are nationals of the above-described countries and persons who are nationals of the German Democratic Republic and Albania.

The decision of this Court in this case will necessarily affect the legal interests of all of our above-described clients.

The complaint herein challenges the constitutionality, on its face and as it has been applied, of Section 2218 of the Surrogate's Court Procedure Act of the State of New York * as an invasion by the State of New York of the exclusive power of the Federal government to conduct foreign relations and as a violation of the Fourteenth Amendment.

Since 1951, petitioners have been involved in the presentation of these constitutional issues in the courts throughout the State of New York from the Surrogate's Courts to the Court of Appeals, the highest Court of the State. Petitioners first raised the issue of New York's involvement in the conduct of foreign relations before this Court in 1953. *Matter of Braier*, 305 N. Y. 148, 111 N. E. 2d 424 (1953), *appeal dismissed sub nom; Kalmanc* v. *Green*, 346 U. S. 802, 745 S. Ct. 32 (1953).

Subsequent to the decision in *Zschernig* v. *Miller*, 389 U. S. 429, 88 S. Ct. 664 we asked the Court of Appeals of the State of New York to apply the standards enunciated by this Court to Section 2218 of the Surrogate's Court Procedure Act of New York. The Court of Appeals declined to deal with the constitutional issue, although petitioners in their brief presented a comprehensive history of the manner in which the New York courts had applied Section 2218 of the Surrogate's Court Procedure Act of New York in contravention of the *Zschernig* decision. *Matter of Kina*, 23 N. Y. 2d 720, 268 N. Y. S. 2d 773. Pre-

* Hereinafter referred to as SCPA 2218.

viously, the Court of Appeals had decided that Section 2218 is constitutional on its face and that it was unable on the record then before it to find that the statute had been unconstitutionally applied. *Matter of Leikind,* 22 N. Y. 2d 346, 292 N. Y. S. 2d 681 (1968).

We represent the plaintiffs before a three-judge court of the United States District Court for the Southern District of New York in *Bjarsch* v. *DiFalco,* U. S. D. C. S. D., 68 Civ. 4216, decision pending, in which the plaintiffs are residents of the German Democratic Republic. They are challenging the constitutionality of SCPA 2218 both on its face and as applied, including subsections 1(a) and (b) of the statute which became effective in June, 1968. In the instant case the Court below quoted the entire statute as part of its decision, including subsections 1(a) and (b). The Attorney-General of New York, in his motion to dismiss the appeal herein has asserted that the constitutionality of subsections 1(a) and (b) is not involved. Since his position is at variance with the position taken by him in the oral argument of the motion before the United States District Court for the Southern District of New York requesting the convening of a three-judge court and because this Court in its order noting probable jurisdiction set forth no limitation, we are not certain whether SCPA 2218 in its entirety will be reviewed by the Court, or only sections 2 and 3 thereof.

In any event, it is our position that the arguments applicable to sections 2 and 3 are equally applicable to subsections 1(a) and (b). There are also independent reasons why, in our opinion, subsections 1(a) and (b) are unconstitutional. We have presented these to the three-judge court in the *Bjarsch* case and we would, of course, present them to this Court, if it were disposed to receive them.

We have received the consent of all the parties in this case to file this *amicus curiae* brief.

Questions on This Appeal

The questions on this appeal are whether on its face and as applied by the New York courts SCPA 2218 is an illegal intrusion by the State into the area of foreign relations and whether it violates the due process and equal protection provisions of the Fourteenth Amendment.

Statute Involved on This Appeal

The New York statute involved in this appeal is section 2218 of the Surrogate's Procedure Act of New York (Appendix 1).

ARGUMENT

POINT I

SCPA 2218 as it has been applied by the Courts of New York is an unconstitutional intrusion into the area of foreign policy reserved exclusively to the Federal Government.

Twenty-two years ago, in *Clark* v. *Allen*, 331 U. S. 503, 67 S. Ct. 1431 (1947), the Court upheld the constitutionality of a California statute "defined in general terms of reciprocity." The statute was attacked as "an invasion of the exclusively Federal field of control over foreign relations," but the Court found no intrusion on the face of the statute and concluded that it would have only "some incidental or indirect effect in foreign countries" (*id.* at p. 517).

On January 15, 1968, the Court decided *Zschernig* v. *Miller*, 389 U. S. 429, 88 S. Ct. 664, in which the same attack was made upon an Oregon statute which provides for the escheat of the interests of non-resident aliens in

Oregon estates unless there is full reciprocity for United States citizens and "proof that such foreign heirs . . . may receive the benefit or use or control of money . . . without confiscation." Ore. Rev. Stat. (1965, §111.070 (1)(c)). The California statute upheld by the Supreme Court in *Clark* v. *Allen, supra,* had no benefit, use or control provision.

Based on more than two decades of intervening experience, the Supreme Court concluded that "The Oregon law does, indeed, illustrate the dangers which are involved if each State speaking through its probate courts, is permitted to establish its own foreign policy," and held the Act to be an unconstitutional invasion of the field of foreign policy.

The basis for the decision in *Zschernig* was the manner in which statutes like the Oregon statute and the New York benefit, use and control statute (SCPA 2218) have been applied. The Court said:

> "At the time *Clark* v. *Allen* was decided, the case seemed to involve no more than a routine reading of foreign laws. It now appears that in this reciprocity area under inheritance statutes, the probate courts of various States have launched inquiries into the type of governments that obtain in a particular foreign nation—whether aliens under their law have enforceable rights, whether the so-called 'rights' are merely dispensations turning upon the whim or caprice of government officials, whether the representations of consuls, ambassadors, and other representatives of foreign nations are credible or made in good faith, whether there is in the actual administration in the particular foreign system of law any element of confiscation.

"As we read the decisions that followed in the wake of *Clark* v. *Allen*, we find that they radiate some of the attitudes of the 'cold war', where the search is for the 'democracy quotient' of a foreign regime as opposed to the Marxist theory. The Oregon statute introduces the concept of 'confiscation,' which is of course opposed to the Just Compensation Clause of the Fifth Amendment. And this has led into minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation whether the fact that some received delivery of funds should 'not preclude wonderment as to how many may have been denied "the right to receive" . . .' "

* * *

"That kind of state involvement in foreign affairs and international developments—matters which the Constitution entrusts solely to the Federal Government—is not sanctioned by *Clark* v. *Allen*. Yet such forbidden state activity has infected each of the three provisions of §111.070, as applied by Oregon.

"As one reads the Oregon decisions, it seems that foreign policy attitudes, the freezing or thawing of the 'cold war,' and the like are the real desiderata. Yet they of course are matters for the Federal Government, not for local probate courts."

The opinion is equally applicable to SCPA 2218 which is identical with that part of the Oregon act, found unconstitutional by the Court, requiring a showing that foreign heirs will have the benefit, use or control of their awarded funds without confiscation. No doubt with a view to making clear the intended scope of its decision,

the Court extended its discussion to the statutes and decisions of California, Montana, New York and Pennsylvania.

The reference to New York appears in a footnote to the last paragraph quoted above in the *Zschernig* decision, 389 U. S. at 437, 88 S. Ct. at 669, in which the Court said:

> "Such attitudes are not confined to the Oregon courts. Representative samples from the other States would include statements in the New York courts, . . ."

The criteria and attitudes proscribed by the Supreme Court in *Zschernig* have permeated the decisions of the New York courts throughout the entire history and operation of SCPA 2218 and this is as true of the Court of Appeals of New York as it is of intermediate Appellate Courts and the Surrogates Courts.

The application of SCPA 2218 by the New York courts to residents of the "Communist" countries began in 1939. *Estate of Hyman Landau*, 172 Misc. 651, 16 N. Y. S. 2d 3. In that decision, the Court said:

> "It is a matter of common knowledge that private ownership of property has been abolished in the Soviet Union, with the result that none of its nationals there resident is permitted by its laws to have the personal control of any property, which is deemed to belong solely to the State. In other words, there is here presented the precise situation contemplated in the note to the amendment to Section 269 at the time of its enactment, to the remedy of which the law was passed that 'transmission or payment to a beneficiary, legatee or other person resident in a foreign country might be circumvented by confiscation in whole or in part.' So far as Russian nationals are concerned, such confiscation by

> and for the use of the government would be of the fund in its entirety and this is not altered by the indication in a current Congressional inquiry that it would be used by the agencies of the Soviet Government in this country to attempt to undermine our institutions and to sabotage our industries."

Ever since, the New York Court of Appeals, either by affirmative action or in denying leave to appeal from the decisions of lower courts, has adopted for its own, policies found unconstitutional in *Zschernig*. Thus, in the *Matter of Geiger*, 7 N. Y. 2d 109, 195 N. Y. S. 2d 831, 833 (1959), the Court of Appeals of New York said:

> "So long as the distributive shares are properly being withheld by the Surrogate because of the special circumstances in which the beneficiaries find themselves as domiciliaries in an iron-curtain country, they are in no position presently to assign any part of the funds withheld."

This same rationale is to be found in *Matter of Leikind, supra*, decided in June, 1968, six months after this Court's decision in *Zschernig*, in which the Court of Appeals decided that SCPA 2218 is constitutional on its face and that it was unable on the record then before it to find that the statute had been unconstitutionally applied.* However, the Court of Appeals read *Zschernig* as possibly suggesting that in a later case this Court might hold that no statutes such as SCPA 2218 could ever be restricted to a "routine reading" of foreign laws. See footnote at 22 N. Y. 2d 352, 295 N. Y. S. 2d 675.

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* Prior to this decision by the Court of Appeals, the Surrogate of Bronx County, on the basis of this Court's decision in *Zschernig* and its remand of *Goldstein* v. *Cox*, 389 U. S. 581, 88 S. Ct. 694 (1968), held he had no right to pay proceeds belonging to Czechoslovak nationals into court and ordered that the funds be transmitted to them. Estate of Lehotsky, New York Law Journal, Jan. 29, 1968, p. 18.

This observation was prophetic because the New York Courts since *Zschernig* have continued, despite the *Leikind* decision, to apply SCPA 2218 in the manner proscribed by *Zschernig*. See post-*Zschernig* citations, *infra* at p. 19.

In *Matter of Geiger, supra,* the Court of Appeals cited with approval *Matter of Herz' Will,* 7 Misc. 2d 217, 163 N. Y. S. 2d 349, 350 (1957), in which the Surrogate of Nassau County said:

> "No new facts are presented in the papers which should cause this Court to reach a determination differing from that reached *In Re Siegler's Will,* 248 App. Div. 436, 132 N. Y. S. 2d 392 and *Matter of Braier's Estate,* 305 N. Y. 148, 111 N. E. 2d 424. Recent events in Hungary have not been reassuring so as to render it likely that the beneficiaries would have the benefit, use or control of the property in question."

The decision of the Appellate Division, Third Department, *In Re Siegler's Will,* cited with approval by the Court of Appeals in *Herz, supra,* affirmed the decree of the Surrogate's Court, Schoharie County, which directed deposit into Court of legacies belonging to Hungarian nationals on the ground that a certificate from the Envoy Extraordinary and Minister Plenipotentiary of Hungary to the United States, stating that the Hungarian legatee would have the full benefit, use and control of the monies representing their legacies, should not be accepted. The Court said:

> ". . . the controlling issue presented is whether the Surrogate was obliged to accept the certificate of the Hungarian Envoy at its face.
>
> "In normal times we assume that a local court would probably accept the certificate of an envoy to this country from a friendly power as to internal conditions in his country. But these are not normal times."

In *Matter of Greenberg*, 17 N. Y. 2d 417, the Court of Appeals denied leave to appeal from an order refusing transmission of estate benefits to Roumanian nationals. The Surrogate of New York County had ordered the funds deposited with the Director of Finance of the City of New York and, in so doing, had concluded as follows:

> "It must be recognized that, whether or not Roumania imposed restrictions within the meaning of §269-a, it is an Iron Curtain country under Soviet dominance and, for such reasons, facts either as to the operation of Roumanian laws or that country's monetary practices are not available to an inquirer who might be regarded as influenced by capitalist doctrines. It would appear that this was the unfortunate position in which the Attorney-General found himself. The Attorney General was able to offer evidence of certain restrictive provisions of Roumanian law governing the ownership and use of property generally and these restrictions are well recognized as consistent with the communist program of subordinating individual freedom for the material advancement of the communist state." *Matter of Greenberg*, 46 Misc. 2d 883, 261 N. Y. S. 2d 176.*

Upon appeal from the decision of the Surrogate, the Appellate Division, First Department affirmed the order, depositing the funds, stating:

> "The substantial differential between the Roumanian internal rate of exchange applicable to

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* And this, in the face of a letter from the State Department to the Governor of New York requesting the Governor, "In view of the foreign policy aspects of this matter . . .," to bring "to the attention of the appropriate authorities of your State, the Department's conclusion that legatees or distributees living in Roumania have the benefit or use or control of such bequests . . ." Letter of Legal Adviser, State Department, to Governor Rockefeller, dated November 9, 1961, judicially noted by the Surrogate.

> estate distributions received from foreign countries and the external rate of exchange establishes that the distributee 'would not have the benefit or use or control of the money or other property due him' as required by §269-a of the Surrogate's Court Act." *Matter of Greenberg*, 24 A. D. 2d 435, 260 N. Y. S. 2d 818.

At variance with the finding in *Greenberg, supra*, that the existence of foreign exchange regulations justifies the application of SCPA 2218, is the recent decision of the Court of Appeals in a breach of contract action involving Cuban interests, in which it said:

> "This is not an era, surely, in which there is anything novel or internationally reprehensible about even the most stringent regulation of national currencies and the flow of foreign exchange. Such practices have been followed, as the exigencies of international economics have required—and despite resulting losses to individuals—by capitalist countries and communist countries alike, by the United States and its allies as well as by those with whom our country has had profound differences. They are practices which are not even of recent origin but which have been recognized as a normal measure of government for hundreds of years, if not, indeed, as long as currency has been used as the medium of international exchange." *French* v. *Banco Nacional de Cuba*, 23 N. Y. 2d 46, 63, 295 N. Y. S. 2d 433, 449 (1968).

The uninhibited tendency of the New York courts in construing SCPA 2218 to exhibit "cold war" attitudes and to intervene in the internal administration of the laws of certain of the countries of Eastern Europe is evident in many decisions.

Thus, *In Re Shefsick's Estate*, Surrogate, Westchester County, 50 Misc. 2d 293 (1966) 270 N. Y. S. 2d 34, the Court based its decision on the fact that

> "No proof was offered, although required by the Court's prior decision, as to the marketplace rate of exchange; i.e., the rate at which Czech currency could be purchased on the 'black' or 'grey' market or in New York banks . . .
>
> * * *
>
> ". . . the court takes judicial notice that the official rate of exchange of the Czechoslovak crown is an artificial rate, and that this rate, and the rate at which United States dollars may be exchanged through the medium of the Tuzex program, both reflect a substantial over-valuation of the Czechoslovak crown, as related to the dollar; . . ."
>
> * * *
>
> "The added argument that the 'standard crown' is purely a domestic currency that cannot be legally brought into Czechoslovakia, and that the price at which it is procurable in this country has no relevancy to the issues herein, avoids the issue . . ."

Similarly, the Surrogate of Westchester County *In Re Draganoff's Estate*, 46 Misc. 2d 167, 259 N. Y. S. 2d 20 (1965), stated:

> "Courts are not required to work in a vacuum. They are allowed to recognize that while the Communist movement may no longer be monolithic, past actions by the governments of 'Iron Curtain' countries in appropriating foreign inheritances by one means or another do create 'special circumstances [which may] make it appear desirable that such payment should be withheld' (Surrogate's Court Act,

§269-a); and it is such and other actions of governments which motivated the legislature to enact §269-a and its predecessor enactments which have created the uncertainty that the alien non-resident distributees or legatees of an 'Iron Curtain' country will have the benefit or use or control of the funds due them (Matter of Geiger's Estate, 12 Misc. 2d 1043, 1044, 175 N. Y. S. 2d 588, 590 aff'd 7 A. D. 2d 1004. 185 N. Y. S. 2d 227, aff'd 7 N. Y. 2d 109, 112, 195 N. Y. S. 2d 831, 833, 164 N. E. 2d 99, 100; Matter of Geffen's Estate, 199 Misc. 756, 104 N. Y. S. 2d 490; Matter of Getream's Estate, 200 Misc. 543, 544, 107 N. Y. S. 2d 225, 226; Matter of Klein's Estate, 203 Misc. 762, 765-767, 123 N. Y. S. 2d 866, 869-871; Matter of Reidl's Estate, 39 Misc. 2d 805, 807, 242 N. Y. S. 2d 105, 107; Matter of Schmiedl, N. Y. L. J., March 24, 1964, p. 14 col. 3 [not otherwise reported]). This uncertainty does exist in these countries, as opposed to countries such as Great Britain (see Matter of Geffen's Estate, supra), which also has currency controls."

The Court in *Draganoff, supra,* also refused to give credence to the testimony of a distinguished Bulgarian law expert about the laws of his country. In this connection, the Surrogate said:

"The Court cannot disregard the fact that Mr. Stephanov is not a free and independent attorney, an impression he sought to create, but a member of a lawyer's collective (cf. Matter of Mitzkel's Estate, 36 Misc. 2d 671, 675-676, 233 N. Y. S. 2d 519, 523, 524), subject to the restrictive pressures commonly applied in 'iron-curtain' countries. As he was about to return to Bulgaria he could not be expected to say

anything in derogation of his country or its fiscal policies."

Another line of reasoning adopted by the New York Courts is that the inclusion of a country on Circular No. 655, 31 C. F. R. §211,* is presumptive evidence that residents of such countries will not receive the benefit, use or control of their funds. *Matter of Braier,* 305 N. Y. 148, app. dism. sub nom., *Kalmane* v. *Green,* 346 U. S. 802 (1953) 74 S. Ct. 32. To the same effect is *Matter of Marek,* 11 N. Y. 2d 740, 226 N. Y. S. 2d 444 (1962) aff'd 13 A. D. 2d 917 (First Department) 217 N. Y. S. 2d 1010, app. dism. sub. nom *Ioannou* v. *New York,* 371 U. S. 30, 83 S. Ct. 6 (1962).

This view has been adopted by Surrogates throughout the state and remains the basis for establishing a *prima facie* case in support of depositing funds and for requiring a foreign legatee to come forward with evidence relating to the legal, social, economic and political systems of his government. When the laws of the foreign governments are introduced, the Attorney-General of the State or the Public Administrators of the county involved, with the approval of the Court, attacks the credibility of the laws, or of the representatives of the foreign government, examines into the internal administration of these laws and bases his request for a deposit of the funds upon a critique of the legal, economic, political and social systems of the foreign governments whose residents are petitioning to receive their legacies. On frequent occasions the Courts, by judicial notice, or independent investigation, exercises these foreign policy functions on their own.

The cases cited above substantiate the conclusion stated herein. See also:

In re Bold's Estate (1940), Surrogate, New York County, 173 Misc. 545, 18 N. Y. S. 2d 291;

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* Hereinafter referred to as the Treasury List. See Appendix II.

In re Best (1951), Surrogate, New York County, 200 Misc. 332, 107 N. Y. S. 2d 224;
In re Lauraitis' Estate (1954), Kings County, 134 N. Y. S. 2d 907;
Matter of Polubatko (1964), 21 A. D. 2d 735 (Fourth Department), 249 N. Y. S. 2d 929;
Matter of Borok (1966), Surrogate, New York County, 49 Misc. 2d 870, 268 N. Y. S. 2d 669;
Matter of Waessel (1960), Surrogate, Kings County, 27 Misc. 2d 694, 210 N. Y. S. 2d 647;
In re Rysiakiewicz's Will (1952), Surrogate, Queens County, 114 N. Y. S. 2d 504.

There are several reasons why the utilization of the Treasury List violates the principles enunciated in the *Zschernig* decision, *supra*. In the first place, Zschernig involved a legacy to a national of East Germany. That government is on the proscribed list of the Treasury Department, a fact of which the Court was aware, since it was a part of the record on appeal. It made no difference as far as the decision was concerned. Nor could it, since the decision was based upon the fact that matters of foreign policy are for the Federal Government and not the State.

That the inclusion of a foreign government on, or its removal from the Treasury list is a political finding involving our foreign relations has been made clear by the Treasury Department. The Treasury list has been amended from time to time to exclude from its provisions certain countries theretofore placed thereon. These include Poland, Roumania and Bulgaria which were removed on June 7, 1957, April 19, 1960 and August 1, 1963, respectively. The Soviet Union, Lithuania, Latvia and Estonia were removed from the list on June 28, 1968. (See Federal

Register, Vol. 22, No. 130 for July 4, 1968, page 9708). Czechoslovakia was removed from the List on June 20, 1968. (See Federal Register, Vol. 33, No. 123 for June 25, 1968, Pages 9302 and 9303.) Hungary was removed from the List on June 27, 1968. (See Federal Register Vol. 33, No. 120 for July 2, 1968, page 9317.) Each of these 1968 amendments to the Circular No. 655 contains the statement that "the amendment involves a foreign affairs function of the United States".

The State Department has also said as much on frequent occasions in letters to this firm and others. In referring to the Treasury List it has said that "The determinations made by the Secretary of the Treasury under 31 C. F. R. 211.3 apply solely to the Federal law and regulations and not to questions of law or fact concerning remittances of private funds, including inheritances," and that they "may involve considerations not relevant to remittances of private funds or other transactions involving rights of private parties" *.

Originally, in 1940, the Treasury List, which was promulgated under the powers granted to the Secretary of the Treasury by P. L. No. 828, Sec. 5, 54 Stat. 1086, 31 U. S. C. A. §123 (approved Oct. 9, 1940) was an administrative measure. Its purpose was to relieve the Division of Disbursement, Treasury Department, of the responsibility for maintaining supervision over the accumulation of checks, delivery of which had become practically impossible because of war-torn conditions in Europe. See 80th

* On June 13, 1968 nine days prior to the removal of the Soviet Union from the Treasury List, the State Department, in a letter to this firm stated "There are Federal prohibitions (31 C. F. R. 211.3) on the transfer of Federal funds to payees in certain foreign countries, including the Soviet Union. These relate to Federal funds only and involve, in large part, considerations not relevant to remtitances of private funds or other transactions involving the rights of private parties."

Cong. Rec. Sec. 12761-2; Report No. 2177 of Senate Committee of Finance accompanying the Bill. Thus, the countries on the 1941 Treasury List included, among others, Belgium, Denmark, France, Luxemburg and the Netherlands.

With the onset of the cold-war, however, the Treasury List became transformed from an administrative to a foreign policy measure, no longer related to its original purpose of meeting the lack of "postal, transportation, or banking facilities in general or local conditions . . ." in the countries placed on the List. See Treasury Department Circular No. 655, March 19, 1941.

Recently, the United States has candidly acknowledged that the Treasury List " . . . involves a foreign affairs function . . ." See references above, on p. 16 to statements made by Treasury and State Departments.

A striking illustration of the consequence of foreign policy intervention by the New York Courts in the application of SCPA 2218 is the history of the decisions in *Matter of Tybus* and *Matter of Kina, infra.*

In 1961, the Surrogate of Kings County ordered that estate funds belonging to Polish nationals be remitted to them. However, he did so only after making a personal visit to Poland " . . . for an on-the-spot investigation of the situation. In connection therewith, the Surrogate conferred with the Ambassador of the United States to Poland in Warsaw, the Secretary to the Embassy and the American Consul; the members of the Association des Juristes Polanaise; members of the Bar Association of Warsaw, the Director-General of the Ministry of Finance and their counsel; Chiefs of Divisions of the Ministry of Foreign Affairs; Chairman, Officers and Members of the Board of Directors of Bank Polska Kasa Opieki and their

General-Counsel and others." *Matter of Tybus*, 28 Misc. 2d 278, 217 N. Y. S. 2d 913 at 915 (1961).

The point, of course, is that even in applying SCPA 2218 so as to permit the remittance of funds, the Judge was acting like a surrogate of the Secretary of State. The result of the Court's acting in this manner is demonstrated by the fact that five years later (the Surrogate who decided *Matter of Tybus* having died), another Surrogate of Kings County promptly decided in another case involving a Polish national that estate funds should no longer be transmitted to Polish nationals, stating, among other reasons, that "the Court disagrees that the economic conditions arising out of the social and political character of the Government of Poland are not relevant." *Matter of Kina*, 49 Misc. 2d 598, 268 N. Y. S. 2d 131, rev'd. 29 A. D. 2d 563, 286 N. Y. S. 2d 773, aff'd. 23 N. Y. 2d 720.

In *Matter of Kina, supra*, the Court of Appeals affirmed the Appellate Division's reversal of the Surrogate and its finding that the Polish claimant would have the benefit, use and control of his funds but it refused to reach the constitutional question of the lower court's intrusion into foreign affairs although that issue was presented to it and fully briefed. And this was subsequent to *Zschernig* and its own decision in *Leikind, supra*.

The result is that the New York courts continue to apply SCPA 2218 in a manner proscribed by *Zschernig*. See the following cases which are not officially reported:

Estate	*County*	*Index No.*	*Trial Date*
Theodore Haab	Suffolk	176A/60	5/16/68
Antony Daria	Suffolk	103A/50	4/16/68
Mary Polubatko	Monroe	1199/58	5/37/68
Maria Zaggers	Nassau	104409	12/11/68
Ignatz Malchun	Richmond	A 177/63	11/ 5/68
Anton Matisz	Suffolk	341A/47	3/18/69
Jacob Petarsky	Saratoga		10/25/68
Mike Kuzmicz	Cattaraugus		4/29/69
Bruno Seemel	Queens	2282/62	6/23/69
Vlades Kurklietis	Queens	7571/66	6/23/69
Edgar Vitsut	Queens	6263/58	6/23/69

In the oral argument before the three-judge court in *Bjarsch* v. *DiFalco*, *supra*, the Attorney-General of New York took the position that in post-*Zschernig* hearings cited above, the Surrogates engaged in conduct proscribed by Zschernig only because more evidence was introduced by the alien legatees than was required under the standards enunciated by the Court of Appeals in *Leikind* and that the Attorney-General in opposing transmission of the claimants' legacies did no more than cross-examine the claimants' expert witnesses on foreign law matters testified to on direct testimony.

We believe that the Attorney-General's contention is disproved by the records in these cases. However, it should be pointed out that because under Section 3 of SCPA 2218 the burden of proof is upon the alien legatee, he can never be sure what quantum of testimony will

satisfy the Surrogate. And, even when an effort has been made to limit the testimony, the Attorney-General, over objection, has been allowed on cross-examination to go far beyond the direct testimony, upon the theory that what he was doing was testing the expert witness' knowledge of the foreign law. Under the cloak of this theory the Court has permitted testimony regarding the nature and character of the foreign government involved and the integrity of its laws and institutions.*

In an effort to stop repetitive hearings, which in each case consist of the same testimony, we suggested to the Attorney-General, by letter dated September 30, 1968 "that the administration of justice would best be served if your office will now adopt a policy of discontinuing the necessity for further hearings on the issue of benefit, use and control insofar as they involve Soviet citizens and residents who are beneficiaries of New York estates." We pointed out that the result of these unnecessary proceedings "has been that the beneficiaries, the attorneys for the parties and the people of the State of New York have suffered monetary loss and the expenditure of time and man power without justification." Almost four months later, on April 18, 1969, the Attorney-General informed us that he would continue to insist upon hearings "in view of the fact that there are presently several pending litigations in Federal Courts involving the same or like questions. . . ."

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* The Surrogates of New York County, having found that the nationals of Czechoslovakia and the Soviet Union do receive the benefit, use and control of their estate funds, nevertheless so apply S. C. P. A. 2218, as to limit the amount of the initial transmission to $5,000 in cases involving Czechoslovak legatees and $10,000 in cases involving Soviet legatees. See Estates of Chounouzides, De Lowe, Halajko, Kaganoff, New York Law Journal, July 18, 1967, p. 10 and Estate of Szekac, New York Law Journal, June 27, 1966, p. 4. This policy is still in effect.

Finally, on this point, we call the Court's attention to the fact that the New Jersey Supreme Court has found unconstitutional as applied that state's benefit, use and control statute. *Estate of Kish*, 52 N. J. 454, 246 Atl. 2d 1.

The New Jersey statute is patterned after SCPA 2218, except that the latter imposes the burden of proof upon the alien legatee.

In finding the New Jersey benefit, use and control statute unconstitutional as applied, the New Jersey Supreme Court stated as follows:

> "Fiduciaries and the courts, which have authority over them and to which they are accountable, are under an obligation to carry out the direction of the testator or settlor, or the legal direction in the case of intestacy. Implicit in that obligation is the duty to deliver monies belonging to such person in foreign countries, and at the same time to be reasonably sure that the amount, less costs of transmission and exchange into foreign currency, can be transmitted to them through regular international banking channels, consular offices or some other legal and effective means. Although this aspect was not mentioned in *Zschernig*, we think a valid reading of our statute thus also permits withholding and payment into court where there is no present *physical* means of transmitting the payment to a beneficiary in a particular country." (emphasis in original)

We respectfully suggest that the criteria adopted in *Kish* are more consistent with the principles of *Zschernig* than those used by the New York Courts.

POINT II

SCPA 2218 as it has been applied by the Courts of New York violates the due process and equal protection clauses of the Fourteenth Amendment.

For more than a quarter of a century SCPA 2218 has been applied solely to alien legatees who are residents of the "Communist" countries. And, since 1960, when the statute was amended so as to impose upon alien legatees the burden of proving that they will have the benefit, use and control of their funds, this burden has been imposed solely upon the residents of these same countries.

The notes of decisions in McKinney's Laws of New York, Annotated, under SCPA 2218 and its predecessor, Section 269a of the Surrogate's Court Act, confirm that the reported cases in the Surrogates' Courts, Appellate Divisions and the Court of Appeals all involve residents of the Soviet Union, Poland, Czechoslovakia, Bulgaria, Hungary, Roumania, Albania, The German Democratic Republic and The Chinese People's Republic.

The reason given by the New York Courts for so applying SCPA 2218 is the fact that the alien legatees involved are residents of governments having a particular political character and that this of and by itself justifies the application of the statute. See cases cited under Point I. Furthermore, the Attorney-General of New York, either on his own or by order of the Surrogate, appears as a party in these cases for the purpose of opposing transmission of the legacies to residents of the above-named countries. He does not appear for that purpose in cases involving residents of any other countries.

The application of SCPA 2218 in this manner is an arbitrary and invidious discrimination against the residents of these countries.

Prior to 1960, SCPA 2218 (then known as Section 269 of the Surrogate's Court Act) did not, on its face, discriminate between citizens and aliens. In 1960, however, the statute was amended so as to impose upon alien legatees the burden of proving that they would have the benefit, use and control of their funds. Section 269-a of the Surrogate's Court Act, Added by L. 1960.

It may well be that we have reached the point in our constitutional development where an arbitrary distinction between citizens and aliens in the right to inherit is violative of the Fourteenth Amendment. In this connection, we note that in *Clark* v. *Allen, supra,* the Court observed that issues under the Fourteenth Amendment were not raised in that case.

But, even assuming, *arguendo,* that there is a substantial reason for discriminating against aliens in the right to inherit, once a State has determined, as has New York, that this right shall be the same for aliens as for citizens, it cannot, without violating their rights under the Fourteenth Amendment, impose unequal burdens upon aliens in the securing of these rights. The burden of proof imposed upon aliens by SCPA 2218 is such an unfair and illegal burden. See *Oyama* v. *State of California,* 332 U. S. 633, 68 S. Ct. 269 (1948).

Furthermore, SCPA 2218 has been applied so as to discriminate exclusively against one group of aliens as against all other aliens solely upon the ground that the aliens discriminated against are residents of "Communist" countries. And this is so whether or not the

alien's government is on the Treasury List. Discrimination based solely upon the political character of the government of which the alien is a resident is akin to the sort of discrimination struck down by this Court which was based solely upon a person's country of origin. *Oyama* v. *State of California, supra, Torao Takahashi* v. *Fish and Game Commission,* 334 U. S. 410, 68 S. Ct. 1138 (1948). For a statutory classification to satisfy the requirements of the Equal Protection Clause, it must be related to some proper governmental purpose, *Truax* v. *Raich,* 239 U. S. 33, 36 S. Ct. 7; *Schnieder* v. *Rusk,* 377 U. S. 163, 84 S. Ct. 1187 (1964). Discrimination of the character here involved against aliens qua aliens cannot be a proper state governmental purpose. See *Hines* v. *Davidowitz,* 312 U. S. 52, 61 S. Ct. 399 (1941).

That non-resident aliens are entitled to due process was established by this Court in *Russian Volunteer Fleet* v. *U. S.,* 282 U. S. 481, 51 S. Ct. 229 (1939) and *U. S.* v. *Pink,* 315 U. S. 203, 62 S. Ct. 552.

We believe that for the same reasons non-resident aliens are entitled to equal protection under the Fourteenth Amendment, particularly in a situation in which the alien is seeking to enforce his rights to property within one of the states of the United States. *Yickwo* v. *Hopkins,* 118 U. S. 356, 6 S. Ct., 1064. See *Sardino* v. *Federal Reserve Bank of New York,* 361 F. 2d 106, 111 (1966). U. S. C. A. 2d, in which that Court said:

> "The government's second answer that the Constitution of the United States confers no rights on non-resident aliens is so patently erroneous in a case involving property in the United States that we are surprised it was made. Throughout our history, the guarantees of the constitution have

> been considered applicable to all actions of the government within our borders—and even to some without . . . "

In any event, the Fourteenth Amendment like the Fifth Amendment forbids the discrimination that is so unjust as to be a violation of due process. *Schnieder* v. *Rusk*, 377 U. S. 163, 84 S. Ct. 1187.

As this Court said in *Bolling* v. *Sharpe*, 347 U. S. 497 74 S. Ct. 693:

> "But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."

Commenting upon the right to due process enjoyed by non-resident aliens, the United States Court of Appeals for the Second Circuit in *Sardino* v. *Federal Reserve Bank*, *supra*, made an observation which is peculiarly applicable to the situation which has faced alien legatees who have been adversely affected by the application against them of SCPA 2218.

> " . . . The due process clause speaks in terms not of taking but of deprivation; we find it hard to say there is no deprivation when a man is prevented both from obtaining his property and from realizing any benefit from it for a period of indefinite duration which may outrun his life. Compare Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 415, 43 S. Ct.

158, 67 L. Ed. 322 (1922); Goldblatt v. Town of Hempstead, 369 U. S. 590, 952-954, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962); ALI, Restatements of Foreign Relations Law §197 (Proposed Official Draft 1962). [Sardino v. Federal Reserve Bank of New York, 361, F. 2d 106 (1966) at p. 111]"

POINT III

SCPA 2218 is unconstitutional on its face because it intrudes illegally into the area of foreign relations.

Whether SCPA 2218 is constitutional on its face must be determined from a reading of the purpose of the statute as enunciated by the Legislature of New York. At the time Section 269 of the Surrogate's Court Act (the predecessor of SCPA 2218) was enacted, there was included in the New York legislative bill, an explanatory note which reads as follows:

> "This amendment is proposed by the Executive Committee of the Surrogate's Association of the State of New York. The purpose of the amendment is to authorize the deposit of monies or property in the Surrogate's Court in cases where transmission of payment to a beneficiary, legatee, or other person resident in a foreign country might be circumvented by compensation in whole or in part. The amendment authorizes the impounding of the fund by the Surrogate to await the time when payment can be made to the beneficiary for his own benefit, use and control." Cited in *Matter of Braier, supra.*

We suggest that the very genesis of SCPA 2218 is proof of its unconstitutionality and that it cannot be applied

without involving the New York courts "in an evaluation, either expressed or implied, of the administration of foreign law, the credibility of foreign diplomatic agents and the policies of foreign governments". See the concurring opinion in *Zschernig* of Mr. Justice Stewart with whom Mr. Justice Brennan joined.

This is particularly true since in 1960, the statute was amended to include a requirement imposing upon *alien* legatees the burden of proving that they will receive the benefit, use or control of the benefits due them. See Section 3 of SCPA 2218, *supra*. We understand that to be the thrust of that part of the decision of the New Jersey Supreme Court in *Matter of Kish, supra,* which, in dealing with the subject of burden of proof, said:

> "We are further of the opinion, *in view of the rationale of Zschernig* as well as the essentially negative language of our statute, that the burden should rest on the party seeking the withholding of distribution . . ." (emphasis supplied).

Twenty-five years of experience, including the past 19 years during which the burden of proof has been statutorily imposed upon alien legatees, indicates that a statute like SCPA 2218 cannot be applied without intervening in foreign affairs. As we have pointed out, the nature of the hearings before Surrogates since the *Zschernig* decision are not substantially different than those which were conducted prior to *Zschernig*. What quantum of proof is an alien legatee claimant required to produce to meet the burden of proof? If his expert witness testifies that there are no laws in his country which prohibit receipt of his legacy, the Attorney-General or the Public Administrator will either ask about "secret laws" or raise questions about the distinction between ownership rights under a social system different than ours, or he

will, under the guise of testing the expert witness' knowledge, raise the most fundamental questions about the credibility of the laws and institutions of the alien legatee's government.

The same sort of hearing will take place if the alien legatee's expert witness testifies as to the existence of laws in the alien's country guaranteeing the right to inherit and own property.

In Philadelphia, the Orphan's Court *en banc* struck down Pennsylvania's benefit, use and control statute as unconstitutional on the basis of this Court's decision in *Zschernig. Estate of Struchmanczuk,* 44 D. C. 2d 155. No appeal from the decision of that six-judge court was taken by the Attorney-General of Pennsylvania.

POINT IV

SCPA 2218 is unconstitutional on its face because it violates the due process and equal protection clauses of the Fourteenth Amendment.

The language of section 269 of the Surrogate's Court Act, the original predecessor statute of SCPA 2218, contained no reference to "alien" legatees.*

However, in 1960, the statute was amended by the addition of a section which imposed upon "alien" legatees the burden of proving that they would have the benefit, use and control of their legacies in the circumstances described by the statute. Section 269-a of the Surrogate's Court Act. Added by L. 1960, ch. 975. The burden of proof requirement is now Section 3 of SCPA 2218.

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* But the legislative note included in the proposed bill stated that its purpose was to authorize the deposit of monies belonging "to a beneficiary, legatee or other person resident in a foreign country" when the transmission "might be circumvented by confiscation in whole or in part." *Supra,* at p. 26.

Such discrimination against aliens qua aliens violates the due process and equal protection provision of the Fourteenth Amendment. See *American Commuters Assn.* v. *Levitt*, 279 Fed. Supp. 40; *Robertson* v. *Ott*, 284 Fed. Supp. 735. Even the Anti-Alien Land Law decisions of this Court upholding the right of a state to discriminate against aliens with respect to their right to own land, dealt with statutes which discriminated against certain kinds of aliens such as those not eligible for citizenship or who had not declared their intention to become citizens.* And, surely, these decisions have lost much, if not all, of their vitiality. See *Oyama* v. *State of California* and *Torao Takahashi* v. *Fish and Game Commission, supra.*

At the least, the *Oyama* case would seem to stand for the proposition that when an unequal burden of proof is imposed upon an alien to enforce a property right which the state has given to all persons regardless of citizenship or alienage, the requirement violates the alien's Fourteenth Amendment rights. The State of New York does not discriminate between aliens and citizens with respect to the right to inherit. Having granted this right equally, it cannot place obstacles in the way of the alien's ability to enforce these rights which it does not place in the way of citizens.

It may not be too much to suggest that we have reached the point where no discrimination should be countenanced against aliens and in the right to inherit except insofar as the Federal government may feel it is necessary as part of the conduct of foreign relations, e.g. Trading with the Enemy Act, 50 App. USCA §5. See *Hines* v. *Davidowitz, supra.*

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* *Terrace* v. *Thompson*, 263 U. S. 197, 44 S. Ct. 15; *Porterfield* v. *Webb*, 263 U. S. 225, 44 S. Ct. 21; *Webb* v. *O'Brien*, 263 U. S. 313, 44 S. Ct. 112; *Frick* v. *Webb*, 263 U. S. 326, 44 S. Ct. 115; *Cockrill* v. *California*, 268 U. S. 258, 45 S. Ct. 490.

CONCLUSION

For the reasons stated above, we respectfully contend that SCPA 2218 is unconstitutional on its face and as it has been applied by the State of New York.

Respectfully submitted,

WOLF POPPER ROSS WOLF & JONES
Amicus Curiae

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APPENDIX I

Section 2218 of the Surrogate's Court Procedure Act of New York

"Section 2218. Deposit in Court for Benefit of legatee, distributee or beneficiary.

"1. (a) Where it shall appear that an alien legatee, distributee or beneficiary is domiciled or resident within a country to which checks or warrants drawn against funds of the United States may not be transmitted by reason of any executive order, regulation or similar determination of the United States government or any department or agency thereof, the court shall direct that the money or property to which such alien would otherwise be entitled shall be paid into court for the benefit of said alien or the person or persons who thereafter may appear to be entitled thereto. The money or property so paid into court shall be paid out only upon order of the surrogate or pursuant to the order or judgment of a court of competent jurisdiction.

"(b) Any assignment of a fund which is required to be deposited pursuant to the provisions of paragraph one (a) of this section shall not be effective to confer upon the assignee any greater right to the delivery of the fund than the assignor would otherwise enjoy.

"2. Where it shall appear that a beneficiary would not have the benefit or use or control of the money or other property due him or where other special circumstances make it desirable that such payment should be withheld the decree may direct that such money or property be paid into court for the benefit of the beneficiary or the person

or persons who may thereafter appear entitled thereto. The money or property so paid into court shall be paid out only upon order of the court or pursuant to the order or judgment of a court of competent jurisdiction.

"3. In any such proceeding where it is uncertain that an alien beneficiary or fiduciary not residing within the United States, the District of Columbia, the Commonwealth of Puerto Rico or a territory or possession of the United States would have the benefit or use or control of the money or property due him the burden of proving that the alien beneficiary will receive the benefit or use or control of the money or property due him shall be upon him or the person claiming from, through or under him."

APPENDIX II

Treasury List—As Amended June 28, 1968

Federal Register, Vol. 33, No. 130—Thursday, July 4, 1968

Title 31—Money and Finance: Treasury

Chapter II—Fiscal Service, Department of the Treasury
Subchapter A—Bureau of Accounts

[Dept. Circular No. 655, 4th Amdt.]

Part 211—Delivery of Checks and Warrants to Addresses Outside the United States, Its Territories and Possessions

Withholding of Delivery of Checks

On the basis of information available to the Secretary of the Treasury, including advice received from the Department of State, the Secretary has determined that postal, transportation and banking facilities in general, and local conditions in Estonia, Latvia, Lithuania, and the Union of Soviet Socialist Republics are such that there is a reasonable assurance that the payee of a check or warrant drawn against funds of the United States, or any agency or instrumentality thereof, will actually receive such a check or warrant and be able to negotiate it for full value. The Treasury Department therefore finds it necessary to amend its regulations at 31 CFR Part 211 (Treasury Department Circular No. 655, as amended) so as to delete those countries from the list of restricted areas in §211.2(a) to which such a check or warrant may not be sent from the United States for delivery. The Department also finds, in accord with 5 U. S. C. 553, that notice and public procedure thereon are not necessary since the amendment involves a foreign affairs function of the United States.

Accordingly, §211.2(a), Subchapter A, Chapter II of Title 31 of the Code of Federal Regulations is amended to read as follows:

§211.2 Withholding of delivery of checks.

(a) It is hereby determined that postal, transportation, or banking facilities in general or local conditions in Albania, Communist-controlled China, Cuba, North Korea, North Viet-Nam, the Russian Zone of Occupation of Germany, and the Russian Section of Occupation of Berlin, Germany, are such that there is not a reasonable assurance that a payee in those areas will actually receive checks or warrants drawn against funds of the United States, or agencies or instrumentalities thereof, and be able to negotiate the same for full value.

• • • •

(Sec. 5, 54 Stat. 1087; 31 U. S. C. 127)

Effective date. This amendment shall become effective upon signature.

Dated: June 28, 1968.

[SEAL]

JOHN K. CARLOCK,
Fiscal Assistant Secretary.

[F.R. Doc. 68-7994; Filed July 3, 1968; 8:50 a.m.]

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

Supreme Court, U.S.
FILED
AUG 2 3 1969
JOHN F. DAVIS, CLERK

No. 66

ANGHEL GOLDSTEIN, a/k/a Andrei Pietraru, IULIU NASTA, a/k/a Julius Nasta and GHEORGHE FUNDI, on behalf of themselves and all others similarly situated,

Appellants,

vs.

JOSEPH A. COX and SAMUEL DIFALCO,
Surrogates of the County of New York,

EDWARD F. SILVER,
Surrogate of the County of Kings,

CHRISTOPHER C. MCGRATH,
Surrogate of the County of Bronx,

JOHN T. CLANCY,
Surrogate of the County of Queens,

ARTHUR LEVITT,
State Comptroller,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEES

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State of New York
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STATE DEPARTMENT LETTER

Letter dated June 13, 1968, to *amicus* from George S. Knight, Chief, Division of Property Claims, Estates and Legal Documents of United States Department of State 11, 13-15

In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. 66

Anghel Goldstein, a/k/a Andrei Pietraru, Iuliu Nasta, a/k/a Julius Nasta and Gheorghe Fundi, on behalf of themselves and all others similarly situated,

Appellants,

vs.

Joseph A. Cox and Samuel DiFalco,
Surrogates of the County of New York,

Edward F. Silver,
Surrogate of the County of Kings,

Christopher C. McGrath,
Surrogate of the County of Bronx,

John T. Clancy,
Surrogate of the County of Queens,
Arthur Levitt,
State Comptroller,

Appellees.

On Appeal From the United States District Court for the Southern District of New York.

BRIEF FOR APPELLEES

Jurisdiction

This Court noted probable jurisdiction herein on April 28, 1968.

Although this acceptance of jurisdiction might be deemed to be inconsistent with the Court's refusal to note jurisdiction in *Gorun* v. *Fall,* 393 U. S. 398 (1969), where it declined to review the denial of a similar summary judgment motion by the District Court of Montana, and although this Court, on its own motion, upon thorough consideration of this sparse record, may conclude that it has improvidently noted jurisdiction herein, we shall brief this appeal as one properly here for review. We note, however, that since the complaint herein has not been dismissed, the Court need not be concerned here with the issues of federal judicial administration or abstention which gave concern to the dissenting judges in *Gorun* (See 393 U. S. 398, 399).

The Statute Involved

New York Surrogate's Court Procedure Act, § 2218 (formerly Surrogate's Court Act, § 269a) is correctly set forth in the appellants' brief. The validity of the first section of the statute, as amended by L. 1968, ch. 998, effective June 22, 1968, was not attacked in this action. The validity of that amendment is the subject of a separate action, entitled *Bjarsch* v. *DiFalco,* U.S.D.C., S.D.N.Y., 68 Civ. 4216, in which the *amicus curiae* represents the plaintiffs attacking the validity of the amendment.*

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* The amendment was designed by the Attorney General of the State of New York to "meet some of the views" expressed by this Court in *Zschernig* v. *Miller,* 389 U. S. 429, where the Court held an Oregon statute to be unconstitutional. See McKinney's Session Laws of New York, 1968, Vol. 2, pp. 2326-2327. The amendment

(*footnote continued on following page*)

Question Presented

Whether New York Surrogate's Court Procedure Act, § 2218, *as applied*, is unconstitutional because it is an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and Congress.

Statement

(1)

When this case was before this Court (389 U. S. 581), on petition for certiorari, a "judgment" which merely refused to order the convening of a three-judge court was vacated and the case was remanded to the Court of Appeals for the Second Circuit "for further consideration in light of *Zschernig* v. *Miller*, 389 U. S. 429", decided the same day. The Court of Appeals, without further argument, but upon reconsideration, reversed the order of the District Court denying the application to convene a three-judge court and remanded the case for consideration of the constitutional issues presented by the complaint. 391 F. 2d 586. The Court of Appeals, upon such reconsideration, observed that this Court, in *Zschernig*, had interpreted *Clark* v. *Allen*, 331 U. S. 503, as being "concerned with the words of a [state] statute on its face, not the manner of its appli-

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(*footnote continued from previous page*)

provides that the New York Surrogate's Court "shall direct" payment into court of an alien's money or property where it appears that an alien legatee, distributee or beneficiary is domiciled or resident within a country to which checks or warrants drawn against funds of the United States may not be transmitted by reason of any executive order, regulation or similar determination of the United States government or any department or agency thereof, payment thereafter being permitted to the alien upon order of the surrogate or pursuant to an order or judgment of a court of competent jurisdiction. See also the minutes of the hearing before the three-judge court (p. 53).

cation"; and noted the fact that, in *Zschernig,* this Court had held that "the history and operation" of a similar Oregon statute constituted "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress". 391 F. 2d, at p. 587.

(2)

The appellants then moved, before a *single* District Court Judge, for summary judgment. By reason of the Court of Appeals order, entered upon "reconsideration upon remand by the Supreme Court of the United States", remanding the issues to a three-judge court for reconsideration, the appellees opposed assumption of jurisdiction over the issues by a single District Court judge (17-21).

On June 13, 1968, District Judge McLean notified the parties that "plaintiff's motion for summary judgment will be heard before the Court of three judges duly designated herein on June 25, 1968 "and to file all papers pertinent to the disposition of the motion" prior to the date of hearing so fixed.

On behalf of the appellees, the Attorney General filed with the three-judge court a supplemental affidavit, sworn to June 20, 1968, to show that there were issues of fact in dispute with reference to the "application" of the terms of the statute here involved which prevented the granting of the relief sought by the plaintiffs. The Attorney General, in addition, underlined the fact that the Surrogates named as defendants exercised jurisdiction in only four of the State's 62 counties; and that their decisions, like those of all the other Surrogates in the State, were reviewable by the Court of Appeals of the State, whose then very recent decision in *Matter of Leikind,* 22 N Y 2d 346 (June 14, 1968), was called to the attention of the three-judge Court, as evidence of the further fact that the highest Court of the State was cognizant of this Court's decision

in *Zschernig* and had decided the *Leikind* case in the light of the *Zschernig* decision. The Attorney General contended that the purpose of the summary judgment motion was to avoid a hearing at which evidence could be produced to show that New York's statute, constitutional on its face, was being applied in a constitutional manner. As further indication of New York's method of application of the statute, the Attorney General also called the three-judge Court's attention to the fact that the New York Court of Appeals, on the very same day it decided *Matter of Leikind (supra)*, had denied the Attorney General's motion for leave to appeal from an order of the Appellate Division, Third Department, directing the transmission of an alien beneficiary's share to Poland (*Matter of Krasowski*, 22 N Y 2d 827), and had referred to its *Leikind* decision, in denying such leave. See also 28 A D 2d 180 (3rd Dept., 1967), the decision appealed from in *Krasowski*. And see *Matter of Kina*, 23 N Y 2d 720 (Nov. 1968), aff'g 29 A D 2d 563 (2d Dept., 1967).

In *Matter of Leikind*, Judge BREITEL, writing for the New York Court of Appeals, held that the petitioner in that case had "made no showing that the lower courts in this case have currently engaged in the conduct criticized, and additionally illustrated in the footnotes of the *Zschernig* case, as interference with foreign relations" (22 N Y 2d at p. 352). New York, clearly, is cognizant, therefore, of the problem of *applying* its statute in a manner which would be federally constitutional under the tests set forth in this Court's prevailing opinion in *Zschernig*.

(3)

In support of their summary judgment motion, appellants referred only to isolated cases in which the New York Courts had applied the statute in question. In response, the Attorney General did not set forth an exhaustive list, but merely examples of cases where the New York courts

had directed transmission of payments to foreign residents to whom transmissions were found to be feasible, even in situations where the persons resided in countries which had *not* been removed from the list of countries to which, pursuant to Treasury Regulation, *federal* funds might not be transmitted (Attorney General's affidavit of June 20, 1968, paragraph 13).

The Attorney General's affidavit also noted the fact that the federal government had long recognized the power of the States to regulate the succession and distribution of the estates of persons located within the individual States. *United States* v. *Fox*, 94 U. S. 315 (1877); *Irving Trust Co.* v. *Day*, 314 U. S. 556, 562 (1942). The Attorney General, in addition, set forth his information that the State Department declined to make a judgment, as to whether in certain Soviet States, Soviet heirs do receive benefit or use or actual enjoyment of estate shares (30).

(4)

No testimony was offered by appellants upon the hearing of their motion for summary judgment. They rested upon an oral argument that this Court's decision in *Zschernig compelled* the invalidation of the New York statute, since application of the statute necessarily required an "invasion of foreign policy" (Minutes, p. 9).

Opinion Below

The three-judge District Court (KAUFMAN, McLEAN and TENNEY, JJ.) unanimously directed the denial of summary judgment. The Court's opinion, written by District Judge McLEAN, after carefully analyzing the holdings of this Court in *Clark* v. *Allen*, 331 U. S. 503 (1947), *Zschernig* v. *Miller*, 389 U. S. 429 (1968), *Ioannou* v. *New York*, 391 U. S. 604 (1968); and after reviewing the history of other litigation as to the constitutionality of this statute in *Mat-*

ter of Braier, 305 N. Y. 148 (1953), app. dism. *sub nom. Kalmanc* v. *Green*, 346 U. S. 802 (1953) and *Matter of Marek*, 11 N Y 2d 740 (1962), app. dism. *sub nom. Ioannou* v. *New York*, 371 U. S. 30 (1962), concluded that the Oregon statute before this Court in *Zschernig* had been held unconstitutional "because of the manner of its application" (p. 39). After also reviewing the decision in *Matter of Leikind*, 22 N Y 2d 346 (1968), in which Judge McLean observed that the New York Court of Appeals, too, had "read the opinion of the Court in *Zschernig* as a decision dealing with the *application* of the statute by the Oregon Courts" (italics supplied), the District Court found (pp. 40-41):

> "In the case before us there is no showing that the New York courts have engaged in the conduct criticized in *Zschernig*. There is no showing and not even any claim that the New York courts have uttered any animadversions concerning Rumania. All we are told is that two New York Surrogates have directed that the distributive shares of plaintiffs Goldstein and Fundi in New York estates be deposited in court, pursuant to the statute, and that the office of the New York Comptroller has declined to turn over certain 'abandoned properties' to persons resident in Rumania or in territories within the jurisdiction of the Soviet Union. We are not informed as to what investigation, if any, preceded these judicial and administrative decisions.
>
> "We conclude that this record is inadequate to justify this court in holding, summarily, that Section 2218 is unconstitutional under the *Zschernig* rule. Without any evidence whatever as to how Section 2218 has been applied in this case, we are unable to say that it has been applied in such a way as to interfere with the foreign relations of the United States. We interpret the Supreme Court's recent ruling denying a rehearing in *Ioannou* as at least an indication that evidence of improper application of the statute is necessary."

ARGUMENT

The District Court correctly held that the plaintiffs herein had failed, in support of their summary judgment motion, to show that New York Surrogate's Court Act, § 2218, is being *applied* unconstitutionally.

No *evidence* was offered to the District Court by the appellants in support of their summary judgment motion, although the District Court set the matter down for a hearing before it at which such evidence might have been offered. Since the burden of showing that New York courts were applying its statute unconstitutionally was upon the plaintiffs, the Attorney General did not deem it proper to undertake the burden of establishing that the statute was *not* being applied unconstitutionally. Documentation of the Attorney General's position had become unnecessary, not only because of the appellants' failure of proof, but also because the New York Court of Appeals had, only a few days before the hearing date, decided *Matter of Leikind*, 22 N Y 2d 346, in the light of this Court's decision in *Zschernig* v. *Miller*, 389 U. S. 429.

In *Matter of Leikind, supra*, Judge BREITEL concluded, for the Court of Appeals, that New York Surrogate's Court Act, § 2218 "would not be unconstitutional under the explicit rationale of the *Zschernig* case" (p. 352):

> "if the Courts of this State, in applying the 'benefit or use or control' requirements, simply determine, without animadversions, whether or not a foreign country, by statute or otherwise, prevents its residents from actually sharing in the estates of New York decedents."

The probate courts of New York are, unquestionably, controlled not only by the decisions of this Court but also by those of the New York Court of Appeals. They *must*, therefore, apply § 2218, in the constitutional manner pre-

scribed both in *Zschernig* and *Leikind*. Whatever documentation for appellants' allegation might have been *possible* prior to the *Leikind* decision, the constitutionality of New York's method of applying § 2218 must be passed upon by this Court in the light of the cautions issued by Judge BREITEL in *Leikind*.

In *Matter of Ioannou*, 371 U. S. 30 (1962), this Court declined to note jurisdiction over an attack upon New York's Surrogate's Court Act, § 269 (now renumbered as Surr. Ct. Act, § 2218). A rehearing, sought in that case on the basis of the *Zschernig* decision, was denied, 391 U. S. 604 (1968), upon representations to this Court made by the New York State Attorney General that further procedures were available in the New York State courts by way of a new application for withdrawal of the funds in *Ioannou* upon the basis of allegations of changed circumstances.* Such an application was made to the Surrogate's Court in Bronx County and was granted. The decision of Surrogate McGrath, in that case, reads simply, *Matter of Marek* (161 N.Y.L.J., No. 97, p. 15, column 7, May 19, 1969):

> "Upon the oral and documentary proof adduced at the hearing in this proceeding, the application of the assignee to withdraw funds now on deposit with the director of finance to the credit of Viktoria Miculka is granted. Settle order."

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*We need not emphasize the fact that New York's statute, unlike the escheat statute involved in the *Zschernig* case, is merely *custodial*. That distinction was observed both by the District Court, inferentially, when it stressed the fact that in *Zschernig*, this Court had noted that "the Oregon statute added to the requirement of reciprocity a new concept of confiscation" (p. 39) and in *Leikind*, where Judge *Breitel* noted for the New York Court of Appeals that the New York statute not only contained no reciprocity clause, but also that "the absence of an escheat provision . . . may be of . . . critical importance." 22 N Y 2d, at p. 351.

With relation to the custodial nature of our statute, the Court should note that even the funds involved in the leading case of

(*footnote continued on following page*)

The New York Court of Appeals has traditionally proceeded with great delicacy, wisdom and with an understanding of the limits of its function in the fields of law which touch upon international relations: *Moscow Fire Ins. Co.* v. *Bank of New York*, 280 N. Y. 286 (1939), aff'd *sub nom. United States* v. *Moscow Fire Ins. Co.*, 309 U. S. 624 (1940): with an expressed aversion for the adoption of "parochial" interpretations of foreign law: *Matter of Utassi*, 15 N Y 2d 436, 442 (1965); and with an appropriate respect for the position of the executive branch of the United States' government as to the proper interpretation to be given to subjects of international law and custom. *Republic of Argentina* v. *City of New York*, 25 N Y 2d —— (decided July, 1969).

The federal government has expressed its policy, in the form of regulations and agreements, with reference to the transmission or non-transmission of *federal* funds. If the federal government, by treaty or otherwise, expresses a similar policy or policies with respect to the transmission of the distributive shares, legacies or bequests derived from the estates of New York decedents, New York will, undoubtedly, be guided or controlled by such expressions of federal policy. We regard the appropriate formulators of our federal foreign policy to be quite capable of precisely labeling the *subject matter* with which they purport

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(*footnote continued from previous page*)

Matter of Menschefrend, 283 App. Div. 463 (1st Dept., 1954), aff'd 8 N Y 2d 1093 (1960), cert. den. *sub nom. Brown* v. *Lefkowitz*, 365 U. S. 842 (1961), were paid by New York to its proper owner when he became known and proved his claim. See *Matter of Menschefrend*, 150 New York Law Journal, No. 5, p. 7, column 5 (July 8, 1963), directing payment to a surviving alien "distributee." This result was obtained, despite the effort made, earlier in the proceedings before a New York Surrogate, by a California public administrator to subject the funds there involved, New York bank deposits of a California decedent, to California escheat procedures, upon the then uncontradicted allegation that Menschefrend had died leaving no known heirs. Our custodial statute is designed to prevent, rather than to accomplish such injustices. McKinney's Consolidated Laws of New York, Abandoned Property Law, Book 2½, p. iii.

to deal. When the Treasury List was amended to delete certain countries from the list of countries to which *federal funds might not* be transmitted, the Department found that its amendment of its regulations could be accomplished without notice and public procedure since "the amendment involves a foreign affairs function of the United States." (Brief of Amicus Curiae, p. 33). No such finding has, to our knowledge, ever been made by the Department of State, or the President, with respect to the devolution or transmission of shares of the estates of decedents of the several states. On the contrary, the *amicus curiae,* upon presenting his arguments to the District Court, conceded that the Department of State had expressly *disavowed* any intention to deal with the subject of estate devolution under state law. See the State Department letter, dated June 13, 1968, addressed to the *amicus'* law firm by George S. Knight, Chief, Division of Property Claims, Estates and Legal Documents of the United States Department of State which was annexed to the *amicus* brief submitted below (Appendix A hereto). See also *United States* v. *First National City Bank,* 396 F. 2d 897, 904 (2d Circ., 1968); and see *United States* v. *Fox,* 94 U. S. 315 (1877); *Irving Trust* v. *Day,* 314 U. S. 556, 562 (1942). The last paragraph of the State Department's letter to the *amicus* merits quotation (*infra,* p. 15).

> "Since the administration of estates is not a Federal function, the remittance of inheritances to foreign beneficiaries, including those in the Soviet Union, does not normally come to the attention of this Department. The Department of State is, therefore, not in a position to know or to make judgment, on the basis of the small number of cases of which the Department has become aware in which Soviet heirs are believed to have received benefit from remittances of estate shares, whether funds sent to persons resident in the Soviet Union from the United States are generally received by them and fully available to them for their use and benefit."

CONCLUSION

The order appealed from should be affirmed.

Dated: New York, New York
August 21, 1969

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellees

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DANIEL M. COHEN
Assistant Attorney General
of Counsel

Appendix

DEPARTMENT OF STATE
Washington, D. C. 20520

June 13, 1968

In reply refer to: SCS

Mr. Jerome I. Lessne
Law Offices
Wolf Popper Ross Wolf & Jones
845 Third Avenue
New York, New York 10022

Dear Mr. Lessne:

The Department has received your letter of May 27, 1968, (Your file No. Y 13622), concerning the remittance of estate funds to beneficiaries in the Soviet Union.

In the absence of an international agreement or applicable Federal laws or regulations on the subject of estates, as is the case with the Soviet Union, the administration of estates is a matter within the jurisdiction of the various States. The local court having funds to be distributed abroad is the appropriate body to determine whether in accordance with State law, distribution may be made. The court would, if pertinent, take into account the recent decision of the U. S. Supreme Court in *Zschernig* v. *Miller* in applying the State law on distribution to alien heirs in foreign countries. In *Zschernig,* the Court held invalid, as applied, an Oregon statute prohibiting the transfer of such funds to non-resident alien heirs, unless the heirs could show that reciprocity in inheritance existed in the foreign country and that they would receive full use, benefit and control of the funds. The Court held that the statute, as applied, was an unconstitutional intrusion by the State into the field of foreign affairs. What effect this

decision might have on similar statutes in other states would be determined, in the first instance, by the court of those states.

There are no Federal prohibitions on the transfer of private funds, including inheritances, to persons resident in the Soviet Union. Such transfers may be effected through banking channels.

There are Federal prohibitions (31 C.F.R. 211.3) on the transfer of Federal funds to payees in certain foreign countries, including the Soviet Union. These relate to Federal funds only and involve, in large part, considerations not relevant to remittances of private funds or other transactions involving the rights of private parties.

The Department is informed that under the foreign exchange control regulations of the Soviet Union, dollar funds are retained by the Soviet Government and the person or institutions to whom remittances are directed receive Soviet currency at a fixed rate of exchange. It might also be noted that these same reimbursements are understood to demand that permanent residents of the Soviet Union report to the Soviet authorities the acquisition of any foreign exchange assets and upon demand, must assign such assets to the Soviet Government against reimbursement in local currency.

It is also understood that inheritance funds may be received by beneficiaries in the Soviet Union through a foreign currency account usuable for purchases through the Soviet foreign trade organization "Vneshposyltorg", which is reported to have some 97 sales outlets in 34 Soviet cities, as well as a number of small sales counters in the larger hotels. Vneshposyltorg certificates issued against a foreign currency account are stated to be valid for an indefinite length of time and may be used against purchases through its sales outlets of both domestic and foreign articles reportedly at discount prices.

Since the administration of estates is not a Federal function, the remittance of inheritances to foreign beneficiaries, including those in the Soviet Union, does not normally come to the attention of this Department. The Department of State is, therefore, not in a position to know or to make judgment, on the basis of the small number of cases of which the Department has become aware in which Soviet heirs are believed to have received benefit from remittances of estate shares, whether funds sent to persons resident in the Soviet Union from the United States are generally received by them and fully available to them for their use and benefit.

Sincerely yours,

GEORGE S. KNIGHT
GEORGE S. KNIGHT
Chief, Division of Property Claims,
Estates and Legal Documents

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MOTION →

IN THE

Supreme Court of the United States

October Term, 1969

Office-Supreme Court, U.S.
FILED
OCT 20 1969
JOHN F. DAVIS, CLERK

No. 66

ANGHEL GOLDSTEIN, a/k/a ANDREI PIETRARU, IULIU NASTA, a/k/a JULIUS NASTA and GHEORGHE FUNDI, On behalf of themselves and all others similiary situated,

Appellants,

against

JOSEPH A. COX and SAMUEL DIFALCO, Surrogates of the County of New York, EDWARD F. SILVER, Surrogate of the County of Kings, CHRISTOPHER C. MCGRATH, Surrogate of the County of Bronx, JOHN T. CLANCY, Surrogate of the County of Queens, ARTHUR LEVITT, State Comptroller,

Appellees.

MOTION FOR

[redacted] LEAVE TO FILE REPLY BRIEF AMICUS CURIAE AND REPLY BRIEF

WOLF POPPER ROSS WOLF & JONES
By MARTIN POPPER
845 Third Avenue,
New York, N. Y. 10022.
Amicus Curiae

678)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

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ANGHEL GOLDSTEIN, *et al.*,

Appellants,

vs.

JOSEPH A. COX, *et al.*,

Appellees.

PETITION FOR LEAVE TO FILE REPLY BRIEF AMICUS CURIAE

The petitioners herein were granted leave to file a brief Amicus Curiae in support of Appellants' jurisdictional statement after they were refused the consent of the Attorney General who represents the Appellees. The Court also noted probable jurisdiction.

Thereafter, having received the consent of all parties, we filed a brief as Amicus in support of our position that Section 2218 of the Surrogate's Court Procedure Act of New York on its face and as it has been applied by the New York Courts is unconstitutional.

The Attorney General of New York has filed a brief for Appellees in which he argues against our views not only as presented to this Court but also in the Court below. (See p. 11 of Appellees' Brief.) Furthermore, the Attorney General's brief set forth (incorrectly) our position as attorneys for the plaintiffs in *Bjarsch* v. *DiFalco*, U. S. D. C., S. D. N. Y., 68 Civ. 4216, argued on May 2,

1969 before a three-judge Court involving an attack upon the same statute under review in this case.

In the circumstances described above, we sought the consent of the Attorney General of New York as well as the attorney for the Appellant, to file a reply brief as amicus. The attorney for the Appellant has given his consent. The Attorney General, by letter dated August 27, 1969, has advised us "that, in accordance with the direction of the head of our New York City office, the Attorney General *declines to consent* to the filing of any further brief of the amicus." (Emphasis in original.)

In the interest of time, we attach herewith our proposed reply brief, together with this Motion for Leave to File the said brief, and respectfully request that leave of this Court be granted and that the attached brief be filed in this case.

Dated, September 5, 1969

Respectfully submitted,

WOLF POPPER ROSS WOLF & JONES,
By MARTIN POPPER
Amicus Curiae

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 66

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AMICUS CURIAE REPLY BRIEF

I

Interest of Amicus Curiae

The interest of the Amicus Curiae in the subject matter of this case has been set forth in the Brief of Amicus Curiae on file with this Court and the statements set forth therein are incorporated herein by reference.

II

Argument

Appellees in effect re-argue their motion to dismiss this appeal, relying again upon *Gorun* v. *Fall*, 393 U. S. 398, 89 S. Ct. 678, affirming a three-judge court's dismissal

of a complaint which sought a judgment declaring the Montana reciprocal inheritance statute to be unconstitutional.

The distinction between *Gorun* and this case is decisive. In *Gorun*, the three-judge court dismissed the complaint on the grounds that "[T]he Montana Court now advised by *Zschernig* of the boundary of the constitutional power of the State . . . should feel free to fashion a procedure for applying §91-520 in a manner not offensive to the Federal Constitution." (Quotation from this Court's opinion in *Gorun, supra.*)

The very point of this appeal, as we have pointed out in our Brief Amicus, is that the New York Courts, including the Court of Appeals, have, despite this court's advice, applied the New York Benefit, Use and Control Statute (hereafter referred to as SCPA 2218) in a manner offensive to the Federal Constitution.

To the degree that the Appellees' brief addresses itself to the question of the manner in which the New York Courts have applied SCPA 2218, it practically concedes that until the decision of the Court of Appeals in *Matter of Leikind*, 22 N. Y. 2d 346, 292 N. Y. S. 2d 681, the New York Courts unlawfully intruded into the area of foreign relations. (See first full paragraph on p. 9 of Appellees' Brief.) Furthermore, Appellees have no where controverted the documentation set forth in the Brief of Amicus demonstrating that the post-*Leikind* decisions continue to apply SCPA 2218 in a manner proscribed by *Zschernig*. The contemporary conduct of the New York Courts is a logical consequence of the fact that the *Leikind* decision itself violates the standards enunciated in *Zschernig*. (See analysis *infra* beginning at p. 5.)

The Court below concluded that the Appellants had made no showing that the New York Courts have intruded

illegally into the area of foreign policy. The Appellees go further, complaining that the Appellants offered no "evidence" in support of their motion for summary judgment, and that therefore "the Attorney General did not deem it proper to undertake the burden of establishing that the statute was *not* being applied unconstitutionally." (Emphasis in original, see p. 8 of Appellees' Brief).

Curiously, the Court below omitted any reference to the comprehensive documentation submitted by Amicus regarding the manner in which the New York Courts have applied SCPA 2218 throughout its history. And that is the only relevant "evidence" in this case.

Now that this Court has noted probable jurisdiction, one would assume that the Appellees would at long last deem it appropriate to controvert the decisional documentation submitted by Amicus Curiae. Their failure to do so stems, in our opinion, from their inability to do so. The record speaks for itself.

We come then to the Appellees' reliance upon the *Leikind* decision.

The first thing that must be noted is that *Leikind* decided only that SCPA 2218 is constitutional on its face and that the petitioner in that case "had made no showing that the lower courts in this case have currently engaged in the conduct criticized, and additionally illustrated in the footnotes of the *Zschernig* case, as interference with foreign relations," *Leikind*, 22 N. Y. 2d at p. 353, 292 N. Y. S. 2d at pp. 685 & 686.

It is true that the petitioner in *Leikind* made no showing of any kind with respect to lower court conduct in the area of foreign relations. He simply relied upon *Zschernig*. Unlike the petition in *Zschernig*, however, Amicus Curiae have made a full showing of the manner in which the New York Courts have applied SCPA 2218.

What is most significant however is that the *Leikind* decision itself is predicated upon criteria adopted by the Court of Appeals prior to and proscribed by *Zschernig*. As the Chief Judge of the Court of Appeals pointed out in his dissenting opinion, "The majority's conclusion . . . rests upon the assumption that, because of the special circumstances in which the beneficiaries find themselves as domiciliaries in an iron-curtain country, they are not in a position presently to assign any part of the funds withheld. (*Matter of Geiger's Estate*, 7 N. Y. 2d, 109, 112, 195 N. Y. S. 2d 831, 833, 164 N. E. 2d 99, 101.) Such an asumption has, to quote from the opinion in *Zschernig*, 389 U. S., at p. 441, 88 S. Ct. at p. 671, 'a direct impact upon foreign relations' and is beyond the competence of the Surrogate's Court."

This is the context in which this Court must weigh the Appellees suggestion that it accept "the cautions" issued by the Court of Appeals in *Leikind*. (Quotation from p. 9 of Appellee's Brief.) These cautions amount to no more than a suggestion that the lower Courts refrain from "animadversions" respecting foreign countries. (See *Leikind*, 22 N. Y. 2d at p. 352, 292 N. Y. S. 2d at p. 685). Apart from the fact that the conclusion reached by the Court of Appeals is itself based upon precedents expressing hostility toward certain foreign governments, the animadversion concept is a narrow, semantic approach to a fundamental constitutional issue.[1] The question involved is not

[1] A principle so fundamental to our system of government as to have been a major reason advanced for adopting the Constitution. See *The Federalist* No. 3, Modern Library Edition, p. 13 in which, at p. 15, the soon-to-become First Justice of the United States pointed out that with respect to the law of nations, ". . . the administration, the political counsels and the judicial decisions of the national government will be more wise, systematical and judicious than those of individual States, and consequently more satisfactory with respect to other nations, as well as more *safe* with respect to us." (Emphasis in original.)

whether state Courts engage in name calling or tactlessness. It is rather whether they intrude unlawfully into the area of foreign relations. If they do so intrude, even though skillfully and politely, they violate the Constitution.

The best proof that the caution urged in Leikind does not meet the test required by the Constitution is that it has had no inhibiting effect upon the lower courts. (See pp. 19-21 of Brief of Amicus. The documentation there cited is uncontroverted.)[1]

The decisions cited in the Appellees' Brief (*Matter of Krasowski*, 22 N. Y. 2d 827 and *Matter of Kina*, 23 N. Y. 2d 720), support our position. In *Krasowski*, the Surrogate and a unanimous Appellate Division found that the Polish petitioners in that case would have the benefit, use and control of their funds. Under New York Law, the Attorney General could not appeal to the Court of Appeals as of right. He was required to seek leave. He sought leave and the Polish petitioners opposed the motion, primarily upon the ground that the Appellant had raised no issue of law of such broad scope and application that an appeal should be allowed.

In his brief in support of his request for leave to appeal, the Attorney General stated: "Although the courts below did not discuss the question, petitioner contended that a determination that Polish beneficiaries would not have the use, benefit and control of their New York lega-

[1] Both the Court of Appeals in *Leikind* and the Court below in this case have indicated that their views on the constitutionality of SCPA 2218 on its face may be overruled by this Court. We have argued in our Brief that the Statute is unconstitutional on its face because it intrudes illegally into the area of foreign relations and because it violates the equal protection and due process provisions of the Fourteenth Amendment, and also that statute as applied violates the same provisions of the Fourteenth Amendment. These contentions are unanswered in the Appellees' Brief. On our Fourteenth Amendment contention, see the recent decision in *Purdy & Fitzpatrick* v. *California*, 71 Cal. 2d —— (July, 1969).

cies, would be in violation of the foreign policy of the U. S. . . .

"This obviously is an appropriate subject for regulation under the police power of the state. *Clark* v. *Allen*, 331 U. S. 503, 517 (1947); *Matter of Braier, supra; Matter of Draganoff*, 43 Misc. 2d 233 (Westch. Co. 1964); *Matter of Weidberg, supra*, as the Attorney General argued, relying on *Clark* v. *Allen, supra*. . . .[1]

"It is anticipated that the petitioner will argue in this case and in the *Kina* case, that this result has been altered by *Zschernig* v. *Miller*, —— U. S. ——, 36 U. S. L. Week 4120 (January 15, 1968), which involved the Oregon statute and a treaty situation. However, the Court declined to reconsider *Clark* v. *Allen*. Moreover, there is no treaty in the instant case and the New York statute, unlike the Oregon statute, involved neither reciprocity nor escheat. It should also be pointed out that the question of the validity of the New York procedure may currently be involved in the case of *Goldstein* v. *Cox*, —— U. S. —— 36 U. S. L. Week 3285 (January 15, 1968), remanded by the Supreme Court to the United States Court of Appeals for the Second Circuit for further proceedings in light of *Zschernig* v. *Miller, supra*."[2]

In their opposing brief, the Polish petitioners said, "We do not know whether the court will be inclined, on a motion for leave to appeal, to reach the important constitutional questions briefed herein. We can only suggest, most respectively, that a denial of the appellant's motion

[1] The significant thing about the cases cited by the Attorney General is that they include New York decisions which the Brief of Amicus shows represent flagrant violations of the policy set forth in *Zschernig*.

[2] That SCPA 2218 is a custodial rather than an escheat statute is inconsequential. See opinion of Hon. Justice Douglas in *Iaonnou*, 391 U. S. 604.

on the ground that SCPA 2218 is unconstitutional would lay to rest a question which has plagued the courts of this state for more than a quarter of a century and which is even now the cause of endless litigation."

The Court of Appeals simply denied the motion for leave to appeal, citing *Leikind*, decided the same day. Thus, *Krasowski* adds nothing to *Leikind*. It merely confirms it.

Kina, however, is more revealing, since in that case the Attorney General appealed as of right (the Appellate Division having reversed the Surrogate's finding that the Polish Appellees would not have benefit, use and control of their legacies). The Polish Appellees asked the Court of Appeals to decide the constitutional questions upon the record which clearly showed that the Surrogate had intruded into the area of foreign relations in a direct and drastic manner.

Despite our showing, the Court of Appeals simply affirmed on the facts and declined to reach the constitutional questions, this time not even citing *Leikind*.

Nor did the decision of this Court in *Ioannou* (Cited on p. 9 of Appellees' Brief) and its subsequent implementation by the Surrogate of Bronx County in *Matter of Marek*, 161 N. Y. L. J., No. 97, p. 15, col. 7, May 19, 1969 alter the view of the Court of Appeals. In its opinion in *Leikind*, it cited *Ioannou* in a footnote in which it observed that in *Goldstein* v. *Cox*, *supra*, this Court had ordered that the constitutional issues should be decided by a three-judge court. When one adds this footnote to its observation that this Court might well find that the statute could not be restricted to a routine reading, it is a reasonable assumption that the Court of Appeals considered its decision a transitional one, subject to the ultimate conclusions to be reached by this Court.

In this historical context, Appellees' suggestion that this Court defer to what they describe as the delicacy, wisdom and understanding with which the Court of Appeals has proceeded in the fields of law which touch upon international relations, is without merit. Leaving aside what seems to us a rhetorical overstatement about the traditional sensitivity of the Court of Appeals, *e.g., U. S. v. Pink*, 315 U. S. 203, 62 S. Ct. 552 (1942),[1] the Appellees' suggestion is predicated upon decisional law in situations unrelated to SCPA 2218. The fact remains that with respect to the application of that statute, the Court of Appeals and the lower New York Courts have intruded into the area of foreign relations in a most insensitive and corrosive manner. And that, after all, is what this appeal is about.

The disregard by the New York Courts and the Attorney General of the limits of state power in the field of foreign relations is dramatized by the way in which they have used the Treasury List. (31C. F. R. 211.3) Appellee's Brief stands that issue on its head.

Amicus Curiae make no claim that the Treasury List controls distribution of decedent's estates. To the contrary, we have pointed out that the Treasury List is an exercise of foreign policy—asserted to be such by the Federal Government—and that the tests used by the Federal Government in determining whether a foreign country should be on or off that List "apply solely to the Federal law and regulations and not to questions of law or fact concerning remittances of private funds, including inheritances, and involve "considerations not relevant to re-

[1] On p. 10 of their brief, Appellees say that New York will "be guided or controlled" by Federal policy, whether expressed "by treaty or otherwise". But New York (including the Court of Appeals) disregarded a precise expression of Federal policy in the field of foreign relations involving Romanian legatees. See footnote on p. 10 of Brief of Amicus.

mittances of private funds or other transactions involving rights of private parties." (See Letter of State Department cited on p. 16 of Brief of Amicus and second full paragraph of Letter in the Appendix in Appellees' Brief.)

It is the Appellees who, despite *Zschernig,* insist that a country's inclusion on the Treasury List is conclusive to a determination whether alien residents of that country will receive the benefit, use and control of their estate funds. It is the policy of the State of New York that estate funds belonging to such an alien legatee "shall" be deposited without even affording the alien a hearing to prove that he will have benefit, use and control. See Section 1(a) of SCPA 2218, (Appendix I of Brief of Amicus) added by L. 1968, eff. June 22, 1968, enacted at the request of the Attorney General of New York.

Appellees argue that the validity of Section 1(a) of SCPA 2218 is not at issue on this appeal. We are not so certain. Although the Appellees have changed their position since the time of the oral argument in *Bjarsch* v. *DiFalco,* U. S. D. C. S. D., 68 Civ. 4216 [1] (see Brief of Amicus, p. 3), the fact remains that the Court below cited the entire statute, without distinguishing between Section 1 and the balance of the statute.

In any event, we have argued in *Bjarsch* that Section 1 is as unconstitutional as Sections 2 and 3 because (a) the use of the Treasury List to withhold transmission of estate funds, considering the foreign policy purposes of the List, violates *Zschernig* and, (b) the mandatory deposit of estate funds without affording the alien legatee the right to a hearing at which he can prove that he would have the benefit, use and control of his funds and upon such proof be entitled to receive them, violates the due

[1] *Bjarsch* was argued before a three-judge court on May 2, 1969, decision pending. Sadly, one of the Judges, the Hon. William B. Herlands, United States District Judge, died August 28, 1969.

process and equal provisions of the Fourteenth Amendment.[1]

It should be added that the plaintiff in *Bjarsch* is attacking the validity of SCPA 2218 in its entirety, including Section 1.

Finally, we call the Court's attention to the recent decision of a three-judge Court of the United States District Court for the Northern District of Ohio, which, on the basis of *Zschernig*, struck down the Ohio benefit, use and control statute (Section 2113.81 of Ohio Revised Code) as unconstitutional. *Mora* v. *Battin*, *U. S. D. C. N. O.*, No. C. 68-227, decision filed June 30, 1969.[2]

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[1] The Attorney General argued in *Bjarsch* that, despite its language, the statute could be interpreted as allowing a hearing to the alien. (See transcript of oral argument.) But since then, at his request, a bill was introduced in the New York Senate to amend Section 1(a) by adding a provision for just such a hearing. See An Act "to Amend the Surrogate's Court Procedure Act" etc., introduced by Committee on Rules ("at request of the State Department of Law"), No. 5696, introduced May 2, 1969, 1969-1970 Regular Session of New York State Senate. May 2 was also the date of the oral argument in *Bjarsch*. The Bill has not been enacted into law.

Because of our uncertainty as to whether this appeal includes a reveiw of Section 1, we have hesitated to include in our briefs the arguments made in *Bjarsch* with respect to that section. However, in our Brief Amicus we stated that we would present these arguments to this Court, if it is disposed to received them.

[2] The Court denied the defendant Probate Judge's motion to dismiss the action based upon his affidavit that, in light of *Zschernig*, he had "abandoned his practice of refusing, as a matter of policy, distribution of assets to heirs residing in Communist countries." He further consented to transfer the assets to the named plaintiffs in the very action before the Court.

The Court considered the defendant's representations "not sufficient to render this controversy moot," among other reasons, because the Ohio statute under review, "is, unless declared otherwise by this Court, a valid part of the law of Ohio."

CONCLUSION

For all the reasons hereinabove stated as well as those stated in the Brief of Amicus Curiae, we urge this Court to reverse the judgment of the Court below and to find that SCPA 2218 is unconstitutional on its face and as applied by the State of New York.

Respectfully submitted,

WOLF POPPER ROSS WOLF & JONES,
By MARTIN POPPER,
Amicus Curiae.

No. 66

opposition to Motion of Wolf, Popper, Ross, Wulf for leave to file reply Brief as amicus curiae filed on Oct 8, 1969.

(not printed)

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 66.—October Term, 1969

Anghel Goldstein aka Andrei Pietraru et al., Appellants, *v.* Joseph A. Cox et al.	On Appeal from the United States District Court for the Southern District of New York.

[January 26, 1970]

Mr. Justice Marshall delivered the opinion of the Court.

Appellants are beneficiaries of New York decedents' estates who live in Romania. Their shares of these estates have not been distributed to them, but have been paid into court for their benefit under § 2218 of the New York Surrogate's Court Procedure Act. Section 2218 authorizes the surrogate to order an alien's share of a New York estate paid into court when it appears that the alien "would not have the benefit or use or control of the money or property" constituting the share.[1]

[1] Section 2218, formerly § 269–a of the New York Surrogate's Court Act, reads as follows:

"1. (a) Where it shall appear that an alien legatee, distributee or beneficiary is domiciled or resident within a country to which checks or warrants drawn against funds of the United States may not be transmitted by reason of any executive order, regulation or similar determination of the United States government or any department or agency thereof, the court shall direct that the money or property to which such alien would otherwise be entitled shall be paid into court for the benefit of said alien or the person or persons who thereafter may appear to be entitled thereto. The money or property so paid into court shall be paid out only upon

In 1966, appellants filed a complaint in the United States District Court for the Southern District of New York, challenging § 2218 on the grounds that it denied them due process and equal protection, that it unconstitutionally intruded upon the Federal Government's conduct of foreign relations, and that it conflicted with federal regulations permitting the payment of federal funds to persons in Romania. Appellants prayed for both temporary and permanent injunctive relief against further operation of the statute, and therefore requested the empaneling of a three-judge court. A single district judge declined to request a three-judge court on the grounds that the constitutional questions raised were frivolous, and the Court of Appeals for the Second Circuit affirmed. This Court granted certiorari, vacated the judgment, and remanded the case to the Court of

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order of the surrogate or pursuant to the order or judgment of a court of competent jurisdiction.

"(b) Any assignment of a fund which is required to be deposited pursuant to the provisions of paragraph one (a) of this section shall not be effective to confer upon the assignee any greater right to the delivery of the fund than the assignor would otherwise enjoy.

"2. Where it shall appear that a beneficiary would not have the benefit or use or control of the money or other property due him or where other special circumstances make it desirable that such payment should be withheld the decree may direct that such money or property be paid into court for the benefit of the beneficiary or the person or persons who may thereafter appear entitled thereto. The money or property so paid into court shall be paid out only upon order of the court or pursuant to the order of judgment of a court of competent jurisdiction.

"3. In any such proceeding where it is uncertain that an alien beneficiary or fiduciary not residing within the United States, the District of Columbia, the Commonwealth of Puerto Rico or a territory or possession of the United States would have the benefit or use or control of the money or property due him the burden of proving that the alien beneficiary will receive the benefit or use or control of the money or property due him shall be upon him or the person claiming from, through or under him."

Appeals for further consideration in the light of *Zschernig* v. *Miller*, 389 U. S. 429 (1968), decided the same day. 389 U. S. 581 (1968). On remand, the Court of Appeals reversed the original order of the District Court, and remanded the case for consideration by a three-judge court. 391 F. 2d 586 (C. A. 2d Cir. 1968).

Appellants then moved for summary judgment, urging that § 2218 was unconstitutional, either on its face or as applied, under the principles of *Zschernig* v. *Miller*, *supra*. In their motion they requested "the relief prayed for in the complaint." They accompanied their motion with an affidavit, largely consisting of a memorandum of law arguing that the application of § 2218 by the New York courts ran afoul of *Zschernig*.

Appellees, surrogates of several New York counties, opposed the motion for summary judgment and further requested that the action be dismissed. In their accompanying affidavit, they argued that § 2218 was constitutional on its face and that there was at least a triable issue of fact whether it was being constitutionally applied.

The District Court denied summary judgment, but did not dismiss the action. 299 F. Supp. 1389 (D. C. S. D. N. Y. 1968). In its opinion it held that § 2218 was not unconstitutional on its face under *Zschernig*, and that the only reported post-*Zschernig* construction of the statute, *Matter of Leikind*, 22 N. Y. 2d 346, 239 N. E. 2d 550 (1968), *appeal pending*, No. 68, O. T. 1969, did not show unconstitutional application.

From the order denying summary judgment, appellants took an appeal to this Court, claiming that we had jurisdiction under 28 U. S. C. § 1253, which provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil

> action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Appellees did not oppose jurisdiction, but rather filed a motion to affirm. We noted probable jurisdiction, 394 U. S. 996 (1969), and received briefs and heard argument confined to the merits. Further examination of the case since oral argument has for the first time raised the question of our jurisdiction, and we have concluded that we lack jurisdiction of the appeal.

A preliminary question is whether the District Court's order denying summary judgment to a plaintiff who has requested injunctive relief is "an order . . . denying . . . an . . . injunction" within the meaning of § 1253. In construing the analogous provision giving the courts of appeals jurisdiction to hear appeals from interlocutory orders granting or denying injunctions, 28 U. S. C. § 1292 (a)(1), this Court has ruled that a denial of summary judgment is not an appealable order denying an injunction, at least where the denial is based upon the existence of a triable issue of fact. *Switzerland Assn.* v. *Horne's Market*, 385 U. S. 23 (1966).[2] However we need

[2] The Second Circuit originally took the view that denial of summary judgment, where an injunction had been prayed for, was an appealable order denying an injunction under § 1292 (a)(1), *Federal Glass Company* v. *Loshin*, 217 F. 2d 936 (1954) (L. Hand, J.; Frank, J., concurring; Clark, J., dissenting). This was contrary to the majority view that such orders were not appealable, a view best represented by *Morgenstern Chemical Co.* v. *Schering Corp.*, 181 F. 2d 160 (C. A. 3d Cir. 1950). The Second Circuit, even before this Court's decision in *Switzerland Assn., supra*, had reversed its position. *Chappell & Co.* v. *Frankel*, 367 F. 2d 197 (1966) (en banc). See also 6 J. Moore, Federal Practice, ¶ 56.21[2], at 2791–2792 (2d ed. 1966).

In *Switzerland Assn., supra*, this Court left open the question whether an order denying summary judgment might be appealable as an order denying an injunction when the ground for the denial was other than the existence of a triable issue of fact.

not decide whether the same treatment should be given to denials of summary judgment under § 1253, for we conclude that the only interlocutory orders which we have power to review under that provision are orders granting or denying *preliminary* injunctions. Since in our view the District Court here decided no question of preliminary injunctive relief, we cannot review its order.

Section 1253, along with the other provisions concerning three-judge district courts, 28 U. S. C. §§ 2281–2284 (a collectivity hereinafter referred to as the Three-Judge Court Act), derive from § 266 of the Judicial Code of 1911, 36 Stat. 1162–1163, which in turn derived from the Mann-Elkins Act of 1910, 36 Stat. 557. As originally enacted, the Three-Judge Court Act required that no *interlocutory* injunction restraining the operation of any state statute on constitutional ground could be issued, except by a three-judge court, and provided that "[a]n appeal may be taken direct to the Supreme Court of the United States from the order granting or denying . . . an interlocutory injunction in such case." 36 Stat. 557, 1163. The Act grew out of the public furor over what was felt to be the abuse by federal district courts of their injunctive powers in cases involving state economic and social legislation. While broad and radical proposals were made to deal with the problem, including proposals to deprive the federal courts of all jurisdiction to enjoin state officers, Congress compromised on a provision which would deal with what was felt to be the worst abuse—the issuance of temporary restraining orders and preliminary injunctions against state statutes, either *ex parte* or merely upon affidavits, and subject to limited and ineffective appellate review. See *Phillips* v. *United States*, 312 U. S. 246, 250 (1941); Hutcheson, A Case for Three Judges, 47 Harv. L. Rev. 795, 803–810 (1934); Note, The Three-Judge District Court and Appellate Review, 49 Va. L. Rev. 538, 539–543 (1963).

Until 1925, the Act required a three-judge court only on application for an interlocutory (or as we would say, preliminary) injunction. In that year, the Act was amended to carry the three-judge requirement forward to the issuance of a permanent injunction, 43 Stat. 938, "in order to avoid the anomalous result of having a single judge review the decree of three judges at the final hearing." Note, *supra*, 49 Va. L. Rev., at 543. The provision governing appeal to this Court was correspondingly amended to allow direct appeal from "a final decree granting or denying a permanent injunction. . . ." 43 Stat. 938.

Thus as of 1925, the provisions of the Three-Judge Court Act relating to appeal to this Court read as follows:

> "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an *interlocutory injunction* in such case. . . ."
>
> ". . . and a direct appeal to the Supreme Court may be taken from a *final decree* granting or denying a permanent injunction in such suit." (Emphasis added.)

As clearly as language can, this language confined this Court's review of three-judge court action to (1) final judgments granting or denying permanent injunctions, and (2) interlocutory orders granting or denying preliminary injunctions.

In 1948, the present Judicial Code was enacted, including § 1253 as it now stands. As the language now reads, the Court has appellate jurisdiction over any three-judge court order "granting or denying . . . an interlocutory or permanent injunction." On its face, this language is subject to the construction that interlocutory orders denying permanent as well as preliminary injunctions can be appealed to this Court. However such a con-

struction would involve an expansion of this Court's mandatory appellate jurisdiction over that granted by the clear language of the prior statute. The Reviser's Note to § 1253 indicates no intent to make such a substantive change; indeed, it refers to the section as merely a consolidation of prior provisions in Title 28, themselves derived from the statute as adopted and amended by Congress.[3]

This Court has more than once stated that its jurisdiction under the Three-Judge Court Act is to be narrowly construed since "any loose construction of the requirements of [the Act] would defeat the purposes of Congress . . . to keep within narrow confines our appellate docket." *Phillips* v. *United States, supra,* 312 U. S., at 250. See *Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S. 368, 375 (1949); *Moore* v. *Fidelity & Deposit Co.,* 272 U. S. 317, 321 (1926). That canon of construction must be applied with redoubled vigor when the action sought to be reviewed here is an interlocutory order of a trial court. In the absence of clear and explicit authorization by Congress, piecemeal appellate review is not favored, *Switzerland Assn.* v. *Horne's Market, supra,* 385 U. S., at 24, and this Court above all others must limit its review of interlocutory orders. *Hamilton Shoe Co.* v. *Wolf Brothers,* 240 U. S. 251, 258 (1916). In light of these factors, and the history of the statute as set out above, we cannot but conclude that our jurisdiction over interlocutory orders under § 1253 is confined to orders granting or denying a preliminary injunction.

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[3] The 1948 revision of the Judicial Code did make one substantive change in the Three-Judge Court Act; it eliminated the requirement, imposed by the 1925 amendment, that a three-judge court should be required to hear an application for a permanent injunction only where an application for a preliminary injunction had originally been made. Reviser's Note, 28 U. S. C. § 2281.

As we read the record, this is not such an order. Appellants did, in their original complaint, pray for preliminary as well as permanent injunctive relief. And in moving for summary judgment, they requested "the relief demanded in the complaint." However they took no practical step toward obtaining such relief. They filed no separate application for a preliminary injunction. In none of their papers, in the District Court or in this Court, have they urged the appropriateness of temporary relief. The District Court in its opinion in no way adverted to the possibility of such relief being granted. Indeed, in the nature of the case, preliminary injunctive relief could never have been a practical possibility. Appellants are seeking the release of funds held in court in New York to beneficiaries outside the jurisdiction of the United States. Any injunction granting relief of this sort must necessarily have been final in its effect, and could hardly have been awarded in the absence of a final determination on the merits in appellants' favor. Since the order here in question is an interlocutory one, and is not an order granting or denying a preliminary injunction, we must dismiss the appeal from that order for want of jurisdiction.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 66.—October Term, 1969

Anghel Goldstein aka Andrei Pietraru et al., Appellants, *v.* Joseph A. Cox et al.	On Appeal from the United States District Court for the Southern District of New York.

[January 26, 1970]

Mr. Justice Douglas, with whom Mr. Justice Black concurs, dissenting.

If summary judgment [1] had been granted to appellants, there would be no question but that this Court would have jurisdiction under 28 U. S. C. § 1253 over an appeal from that judgment, as it would constitute an "order granting . . . an interlocutory or permanent injunction." Similarly, there seems little room for argument that the denial of summary judgment to appellants constitutes an order "denying . . . an interlocutory or permanent injunction," since such injunctive relief was requested in appellants' complaint.[2] The majority opinion relies

[1] The appellants' motion for summary judgment was as follows:

"Plaintiffs move the court as follows:

"1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiffs' favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law; and, especially, in the light of Zschernig v. Miller, 36 L. W. 4120 (1/15/68), decided by the Supreme Court of the United States.

"The Affidavit of John R. Vintilla is attached hereto in support of this motion."

[2] The "relief demanded in the complaint" included:

"That [the District Court] issue *a permanent injunction* forever restraining and enjoining the defendants and each of them, their agents and employees, from denying plaintiffs, and others similarly

on *Switzerland Assn.* v. *Horne's Market*, 385 U. S. 23, as authority for dismissing this appeal for want of jurisdiction under 28 U. S. C. § 1253. In that case, however, the denial of summary judgment was based solely on the existence of a triable issue of fact;[3] the summary judgment did not concern in any way the merits of the case. This case involves more. Appellants claimed that § 2218 of the New York Surrogate's Court Procedure Act was unconstitutional on its face. The denial of summary judgment constituted a rejection of this claim on the merits, as well as a denial of injunctive relief based on that claim. On this basis, I would find jurisdiction under 28 U. S. C. § 1253 to decide this appeal on the merits.

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situated, the right to their distributive shares from decedents' estates, and to other funds to which they may be entitled; that the defendants, and each of them, their agents, and employees, be ordered and directed to take such action as shall be necessary to deliver the distributive shares and other funds which are due and owing to and being withheld from these plaintiffs and others similarly situated.

"That *pending the final hearing and determination of this complaint upon its merits, the Court issue a preliminary injunction*, restraining the defendants and each of them, their agents, and employees, from denying the plaintiffs, and others similarly situated, the right to their distributive shares and other funds to which they may be entitled." (Emphasis added.)

[3] *Switzerland Assn.* involved an action for unfair competition under the federal trademark laws, 15 U. S. C. § 1051 *et seq.* The sole claim was that defendant's actions in selling cheese labeled as "imported Swiss cheese" which had been imported into the United States from a country other than Switzerland were illegal under the trademark laws. The defense was that "imported Swiss cheese" had come to have an accepted meaning in the trade of Swiss cheese that had been imported from any country. The District Court found that the meaning in the trade of "imported Swiss cheese" was an issue of fact as to which there was a genuine dispute, and therefore denied the plaintiffs' motion for summary judgment.

The request for injunctive relief therefore had to await a jury trial on the facts.